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No. (1)

Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

MELODIE M. KLEIMAN,

Petitioner,

v.

THEODORE W. KLEIMAN,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California

PETITION FOR WRIT OF CERTIORARI

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June 12, 2007

QUESTIONS PRESENTED

1. Have the due process requirements of the United States Constitution, Amendment XIV, § 1, been met if appellate review is limited to whether there is substantial evidence and no abuse of discretion from the point of view of a "reasonable judge," when there is legal error?

2. Is it a violation of United States Constitution, Article VI, Clause 2, for a state court to fine or otherwise punish a litigant for filing an action in the federal court?

LIST OF PARTIES

The parties are Melodie M. Kleiman and Theodore W. Kleiman, who are individuals.

CORPORATE DISCLOSURE

There are no corporations, parent companies or subsidiaries involved in this action.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
CORPORATE DISCLOSURE	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
I. UNDERLYING FACTS AND PROCEDURAL HISTORY AT TRIAL AND ON APPEAL AND PETITIONER'S RULE 14.1(g)(i) STATEMENT	5
A. Legal Issues Raised in the Trial Courts, Court of Appeal and the Supreme Court of California	5
B. Comparison of Outcomes Under the "Reasonable Judge" or Legal Error Tests	11
1. Compliance with Pre-Trial Order vs. Hypothetical Person	11
2. Modification of Temporary Support	14
3. Courts Practicing Medicine	16
4. California Family Code § 4320 Factors and Setting Permanent Support	18
5. Attorneys' Fees Under California Family Code § 2030 and "Bad Conduct"	19

TABLE OF CONTENTS – Continued

Page

6. Implicit Notice of Motion 23

7. Gross Disparity Between Assets/Income of Respondent and Petitioner 26

REASONS FOR GRANTING THE WRIT 27

I. DUE PROCESS, THE REASONABLE JUDGE AND THE SUPREMACY CLAUSE 27

II. THE NEED FOR REVIEW BY THE UNITED STATES SUPREME COURT IS COMPELLED BY THE LACK OF A REMEDY OUTSIDE OF THIS COURT 28

A. The Lack of Remedy Outside of This Court Further Violates Petitioner's Due Process Rights 28

CONCLUSION 30

APPENDIX

I. Court of Appeal Opinion ..... App. 1

II. Further Judgment on Reserved Issues ..... App. 32

III. Amended Statement of Decision ..... App. 47

IV. Denial of Petition for Rehearing ..... App. 87

V. California Supreme Court Denial of Petition for Review ..... App. 88

VI. California Family Code § 271 ..... App. 89

VII. California Family Code § 2030 ..... App. 90

VIII. California Family Code § 2032 ..... App. 91

TABLE OF CONTENTS – Continued

Page

IX. California Family Code § 4320 ..... App. 93

X. Application for Extension of Time to File Petition for Rehearing and Order Granting Extension of Time ..... App. 95

TABLE OF AUTHORITIES

Page

CASES

Adoption of Alexander S. (1988) 44 Cal. 3d 857 [750 P.2d 778; 245 Cal.Rptr. 1] 17

Angel v. Bullington (1947) 330 U.S. 183 [67 S. Ct. 657; 91 L. Ed. 832] 30

Buckhantz v. R.G. Hamilton & Co. (1945) 71 Cal.App. 2d 777 [163 P.2d 756] 13

Bush v. Gore (2000) 531 U.S. 98 [121 S. Ct. 525; 148 L. Ed. 2d 388] 30

Castagnoli v. Castagnoli (1954) 124 Cal.App. 2d 39 [268 P.2d 37] 25

Giandeini v. Ramirez (1936) 11 Cal.App. 2d 469 [54 P.2d 91] 25

Goldberg v. Kelly (1970) 397 U.S. 254 [90 S. Ct. 1011; 25 L. Ed. 2d 287] 24

Gonzales v. Superior Court (1987) 189 Cal.App. 3d 1542 [235 Cal.Rptr. 106] 25

Guelfi v. Marin County Employees' Retirement Association (1983) 145 Cal.App. 3d 297 [193 Cal.Rptr. 343] 22

Harless v. Carter (1954) 42 Cal. 2d 352 [267 P.2d 4] 22

Hecq v. Conner (1928) 203 Cal. 504 [265 P. 180] 25

Hernandez v. Imperial Irrigation District (1967) 248 Cal.App. 2d 625 [56 Cal.Rptr. 811] 22

Howlett v. Ros (1990) 496 U.S. 356 [110 S. Ct. 2430; 110 L. Ed. 2d 332] 29

In re Marriage of Paul (1985) 173 Cal.App. 3d 913 [219 Cal.Rptr. 318] 11

TABLE OF AUTHORITIES – Continued

Page

In re Marriage of Siegel (1972) 26 Cal.App. 3d 88 [102 Cal.Rptr. 613] 11

Kenney v. Supreme Lodge of the World, LOM (1920) 252 U.S. 411 [40 S. Ct. 371; 64 L. Ed. 638] 30

Kleiman v. Kleiman (2006) 2006 Cal.App. Unpub. LEXIS 11534 1

Kleiman v. Kleiman (2007) 2007 Cal.App. LEXIS 174 1

Kleiman v. Kleiman (2007) 2007 Cal. LEXIS 2244 1

Lambert v. California (1957) 355 U.S. 225 [78 S. Ct. 240; 2 L. Ed. 2d 228] 24

Magnus v. Edwards (1981) 40 F.Supp. 2d 908 4

Marriage of Andreen (1978) 76 Cal.App. 3d 667 [143 Cal.Rptr. 94] 26

Marriage of Chapman (1988) 205 Cal.App. 3d 253 [252 Cal.Rptr. 359] 22

Marriage of Ditto (1988) 206 Cal.App. 3d 643 [253 Cal.Rptr. 770] 13, 14

Marriage of Duncan (2001) 90 Cal.App. 4th 617 [108 Cal.Rptr. 2d 833] 4

Marriage of Green (1992) 6 Cal.App. 4th 584 [7 Cal.Rptr. 2d 872] 4, 10

Marriage of Maxfield (1983) 142 Cal.App. 3d 755 [191 Cal.Rptr. 267] 13

Marriage of Ostler & Smith (1990) 223 Cal.App. 3d 33 [272 Cal.Rptr. 560] 26

Marriage of Rosenthal (1961) 197 Cal.App. 2d 289 [17 Cal.Rptr. 186] 24

TABLE OF AUTHORITIES – Continued

Page

Marriage of Serna (2002) 85 Cal.App. 4th 482 [102 Cal.Rptr. 2d 188] .....*passim*

Marriage of Weinstein (1992) 4 Cal.App. 4th 555 [5 Cal.Rptr. 2d 558] 8

Marriage of Wodicka (1976) 17 Cal. 3d 181 [550 P.2d 1051; 130 Cal.Rptr. 515].....13, 27

Mass v. Board of Education (1964) 61 Cal. 2d 612 [394 P.2d 579; 39 Cal.Rptr. 739] 22

McKay v. Longsworth (1989) 211 Cal.App. 3d 1592 [260 Cal.Rptr. 250] 14

People v. Honig (1996) 48 Cal.App. 4th 289 [55 Cal.Rptr. 2d 555] 23

People v. Ledesma (1997) 16 Cal. 4th 90 [939 P.2d 1310; 65 Cal.Rptr. 2d 610] 22

People v. Swink (1984) 150 Cal.App. 3d 1076 [198 Cal.Rptr. 290] 24

Poway Unified School District v. Jih Jung Chow (1995) 39 Cal.App. 4th 1478 [46 Cal.Rptr. 2d 651]..... 22

Ramey v. Myers (1958) 159 Cal.App. 2d 82 [323 P.2d 805] 25

Reher v. Reed (1913) 166 Cal. 525 [137 P. 263] 25

Richard v. Richard (1954) 123 Cal.App. 2d 900 [267 P.2d 867] 13

Roethke v. Roethke (1997) 214 Wis. 2d 592 [571 N.W. 2d 925] 4

Rooker v. Fidelity Trust Co. (1923) 263 U.S. 413 [44 S. Ct. 149; 68 L. Ed. 362] 29

TABLE OF AUTHORITIES – Continued

Page

Ryan v. California Interscholastic Federation, (2001) 94 Cal.App. 4th 1048 [114 Cal.Rptr. 2d 798] 24

San Francisco v. Superior Court (1959) 53 Cal. 2d 236 [1 Cal.Rptr. 158] 18

Savage v. Smith (1915) 170 Cal. 472 [150 P. 353] 25

Shields v. Shields (1942) 55 Cal.App. 2d 579 [130 P.2d 982] 25

Slavin v. Borinstein (1994) 25 Cal.App. 4th 713 [30 Cal.Rptr. 2d 745] 14

State v. Kessen (1991) 165 Wis. 2d 394 [478 N.W. 2d 68] (unpublished) 4

State v. Wiederholt (1993) 174 Wis. 2d 602 [501 N.W. 2d 471] (unpublished) 4

Taliaferro v. Riddle (1959) 167 Cal.App. 2d 567 [334 P.2d 950] 25

Traders Credit Corp. v. Superior Court (1931) 111 Cal.App. 663 [296 P. 99] 25

Westphal v. Westphal (1943) 61 Cal.App. 2d 544 [143 P.2d 405] 25

Whittington v. McKinney (1991) 234 Cal.App. 3d 123 [285 Cal.Rptr. 586] 13

CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTES

U.S. Constitution, Article VI, Clause 2 ..... 2, 9

U.S. Constitution, Amendment XIV, § 1 ..... 2, 5

28 U.S.C. § 1257(a) 2

TABLE OF AUTHORITIES – Continued

Page

CALIFORNIA STATUTES

California Code of Civil Procedure § 1010 25
California Code of Civil Procedure § 1859 23
California Family Code § 271 ..... 10, 20
California Family Code § 2030 ..... *passim*
California Family Code § 2032 ..... 10, 19, 20, 22, 23
California Family Code § 2032(a) 21
California Family Code § 2032(b) 21
California Family Code § 4320 ..... *passim*
California Family Code § 4320(e) 16, 18, 19
California Family Code §4320(j) 16
California Family Code § 4330(a) 24
California Family Code § 4332 24
California Government Code § 68081 17

RULES

United States Supreme Court Rule 29.4 2
California Rules of Court, Rule 8.163 12
California Rules of Court, Rule 8.500(b) 29

TREATISES

Eisenberg, *et al.*, The Rutter Group, *California Practice Guide*, Civil Appeals and Writs (2006) § 13:4 29

TABLE OF AUTHORITIES – Continued

Page

Eisenberg, *et al.*, The Rutter Group, *California Practice Guide*, Civil Appeals and Writs (2006) § 13:11 29

Sutherland, *Statutory Construction* 1A (6th ed. 2000), Mandatory, Directory, Prohibitory and Permissive Statutes, ¶25:3, pp. 604-610 20

Sutherland, *Statutory Construction* 1A (6th ed. 2000), Mandatory, Directory Prohibitory and Permissive Statutes, ¶25:4, pp. 610 ..... 21, 22

Sutherland, *Statutory Construction* 2B (6th ed. 2000), Interpretation by Reference to Related Statutes, § 51.01, pp. 170-176 22

Sutherland, *Statutory Construction* 2B (6th ed. 2000), Interpretation by Reference to Related Statutes, § 51.02, pp. 176-178 23

Sutherland, *Statutory Construction* 3A (6th ed. 2000), Statutes Relating to Domestic Relations, § 69:10, pp. 426-432 22

Witkin, *California Procedure 4th,* Vol. 2, Jurisdiction § 276 18

Witkin, *California Procedure 4th,* Vol. 6, Proceedings Without Trial § 9 25

Witkin, *Summary of California Law, 10th ed.,* Vol. 7, Constitutional Law § 615 24

Witkin, *Summary of California Law, 10th ed.,* Vol. 7, Constitutional Law § 638 24

PETITION FOR WRIT OF CERTIORARI

Petitioner Melodie M. Kleiman respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of California.

OPINIONS BELOW

The Further Judgment on Reserved Issues (App. 32), incorporating the trial court's Amended Statement of Decision, is unpublished. The Amended Statement of Decision (App. 47) also is unpublished.

The 3-0 opinion of the California Court of Appeal upholding that judgment (App. 1) is unpublished but is available at 2006 Cal. App. Unpub. LEXIS 11534. The Court of Appeal's order declining to rehear the case (App. 87) is unpublished but is available at 2007 Cal. App. LEXIS 174.

The California Supreme Court's judgment (App. 88) is unpublished but is available at 2007 Cal. LEXIS 2244.

The Application for Extension of Time to File Petition for Rehearing and the Order Granting the Extension of Time are unpublished but are attached. (App. 95)

JURISDICTION

The order of the California Supreme Court (App. 88) declining discretionary review of the case was entered 3/14/07.

The denial of Petition for Rehearing (App. 87) was filed 1/22/07.

Petitioner's Application for Extension of Time to File Petition for Rehearing (App. 89) was filed and granted on 1/19/07, extending the time to file to 1/22/07.

The order of the Court of Appeal (App. 1) was filed 12/21/06.

The trial court's Further Judgment on Reserved Issues (App. 32) was filed 7/22/05.

The trial court's Amended Statement of Decision (App. 47) was filed 3/14/05.

This petition is timely pursuant to Rule 13.1. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

Notifications under Supreme Court Rule 29.4 are not required.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendment XIV, § 1, provides in pertinent part that "No state shall . . . deprive any person of life, liberty, or property, without due process of law."

U.S. Constitution, Article VI, Clause 2, which provides in pertinent part that all laws made by the United States "shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

STATEMENT OF THE CASE

This case involves the question of whether an examination of legal error is required even if the trial court had substantial evidence, did not abuse its discretion and otherwise acted as a "reasonable judge."

This is a family law action that originally settled by stipulation. Subsequently, Petitioner discovered that Respondent had hidden approximately $500,000 for the sale of stock in his employer. Petitioner filed a motion to

set aside and Respondent so stipulated. The parties settled the action again with regard to some issues but left others to be tried, including enforcement of a pre-trial court order requiring Respondent to pay the full cost of the college expenses of their children in the categories of tuition, room and board and transportation to and from; temporary and permanent spousal support; and attorneys' fees based on need and ability to pay and/or based on bad faith conduct.

The Court refused to order reimbursement because Respondent had paid some of the college expenses even though the unappealed pre-trial order required him to pay the full cost.

The court reduced temporary support retroactively on the basis of mathematical errors and by refusing to consider Petitioner's actual unreimbursed medical expenses of $2000 per month, limiting the amount considered to the deduction on Petitioner's income tax return after reductions based on her adjusted gross income, or $695 per month. The court also allowed a hardship deduction of $625 but its purpose was not disclosed. The total of $695 and $625 was less than the total of unreimbursed medical expenses less the cost of alternative care.

Petitioner sought attorneys' fees on the basis of Respondent's bad conduct but the court refused because the due diligence process of the Clinic sale had not been completed at the time of the original settlement and therefore the value of the Clinic was as represented by Respondent (zero).

Petitioner also sought attorneys' fees on the basis of need. The court found that she needed them and Respondent had the ability to pay, but refused to award them to her because she had engaged in bad conduct by filing a

RICO action against Respondent and others in federal court based on their hiding the sale of the Clinic.

In addition, Petitioner was fined $30,000 under *Marriage of Green* (1992) 6 Cal.App. 4th 584 [7 Cal.Rptr. 2d 872] for filing the federal action even though the federal court refused to grant Respondent's Motion for Judgment on the Pleadings and Motion to Dismiss although the fine was not going to be enforced because Petitioner did not have the ability to pay it.

The college expenses issue was reviewed on the "substantial evidence" test. The support issues were reviewed on the "abuse of discretion" test and the attorneys' fees issue was reviewed on the basis of the "reasonable judge" test. For purposes of discussion, the three tests are collectively referred to herein as the "reasonable judge" test.

Under California law, as well as elsewhere, a decision made must be affirmed on appeal unless no reasonable judge could make it. *Marriage of Duncan* (2001) 90 Cal.App. 4th 617, 630 [108 Cal.Rptr. 2d 833], cited by the Court of Appeal herein at App. 29.

There is a conflict in the various circuits as to what constitutes a "reasonable" judge. *Magnus v. Edwards* (1981) 40 F.Supp. 2d 908, 914-915, sets out the history of the various definitions. (App. 92)

Only three cases – one published and two unpublished – state that affirming a case on appeal under the reasonable judge standard requires that there be no legal error: *Roethke v. Roethke* (1997) 214 Wis. 2d 592 [571 N.W. 2d 925]; *State v. Wiederholt* (1993) 174 Wis. 2d 602 [501 N.W. 2d 471] (unpublished) and *State v. Kessen* (1991) 165 Wis. 2d 394 [478 N.W. 2d 68] (unpublished). In every other instance, the review ends if a "reasonable judge" could

have reached the same conclusion. Arguably, any hypothetical reasonable judge could be created in the mind of the author of the appellate opinion to find virtually anything. That, in and of itself, does not constitute due process. If there are allegations of legal error, they must be examined and if legal error is found, the reasonable judge theory should no longer be available.

In the present case, the Court of Appeal ruling amounts to: "The trial court ruled A, therefore it could rule A, therefore we affirm." There was no review of the allegations of legal error (see discussions, *infra* at pp. 11-26). The perceived absence of abuse of discretion and the existence of substantial evidence was enough to affirm.

This Court should grant review to set an objective definition of what a reasonable judge is and make it clear that being reasonable is not enough to overcome legal error. This is particularly important in family law cases. Given a national divorce rate of approximately 50%, this forum is one in which Americans often participate. It is also a forum in which most people cannot afford to go beyond the trial court level.

I. UNDERLYING FACTS AND PROCEDURAL HISTORY AT TRIAL AND ON APPEAL AND PETITIONER'S RULE 14.1(g)(i) STATEMENT

A. Legal Issues Raised in the Trial Courts, Court of Appeal and the Supreme Court of California.

The legal issues are:

1. Have the due process requirements of the United States Constitution, Amendment XIV, § 1, been met if appellate review is limited to whether there is substantial

evidence and no abuse of discretion from the point of view of a "reasonable judge," when there is legal error?

(a) Trial Court

The issues of legal error were raised in the trial court in the Objections and Motions for New Trial. The trial court denied the Motions for New Trial and overruled the Objections. Legal error was raised in the following:

(1) Notice of Intention to Move for New Trial, filed 8/19/2003; Respondent's Objections to Statement of Decision and Proposed Order After Bifurcated Trial – College Expense Reimbursement, filed 8/19/2003:

"[T]he [order requiring (Respondent) to pay the full cost of the college expenses] was never set aside or appealed." Appellant's Appendix 885

(2) Notice of Intention to Move for a New Trial, filed 2/20/04, and Respondent's Objections to Proposed Statement of Decision (Spousal Support), filed 2/20/04:

(a) "The court has abused its discretion and made a legally unsupportable finding in the calculation of support by refusing to consider [Petitioner's] alternative therapy/healing as health related expenses, basing its refusal on the fact that "this type of [meditation instruction] treatment/therapy has not been covered nor recognized by her medical insurance carrier as covered medical costs." Appellant's Appendix 1079-1080

(b) "The court has abused its discretion and made a legally unsupportable finding . . . by unilaterally modifying the previous court order relating to the college education expenses of the adult children of the parties [without notice]" Appellant's Appendix 1081 "At the very least, to meet the bare minimums of due process requirements, Petitioner was required to give specific notice of his

intent to argue that the . . . order should be terminated or modified." Appellant's Appendix 1083

(c) "[Petitioner] had a valid court order for reimbursement of the full amount of tuition, room and board and transportation to and from for the adult college student children. She relied on that order in making expenditures on their behalf when Petitioner refused to pay the full amount needed and/or owing. The *Serna* case [*Marriage of Serna* (2002) 85 Cal.App. 4th 482 [102 Cal.Rptr. 2d 188, which eliminated support for college expenses] is not applicable to the present circumstances [denial of permanent spousal support]." Appellant's Appendix 1092

(d) "The court's math is simply not correct [with examples]." Appellant's Appendix 1094

(3) Notice of Intention to Move For A New Trial filed 7/22/04 and Respondent's Objections to Proposed Statement of Decision [re Attorney's Fees] filed 7/22/04:

(a) "The court has abused its discretion and made a legally unsupportable finding in its holding that [Respondent] prevailed on the issue of spousal support [where no notice was given, Petitioner's] alternative care medical expenses were not included in the calculations and she was denied support because she spent her money educating her children when Respondent did not pay under the unappealed court order." As such, the findings are not an appropriate basis for the determination of the attorneys' fees issue. Appellant's Appendix 2337

(b) "There is no reasonable basis in fact or in law for the Court's conclusion that [Respondent] had no idea about the true value of the Clinic and that [Petitioner] acted in bad faith [in filing the RICO action]." Appellant's Appendix 2341

(b) Court of Appeal

The issues were raised in the Court of Appeal in Petitioner's Opening Brief and Reply Brief. The Court of Appeal affirmed the trial court's decisions.

(1) "[Respondent] did not appeal either one of the Bradley orders . . . Ted did not appeal the Cloninger order [re payment of college expenses]." Petitioner's Opening Brief ("AOB") 9

(2) "The Court's reliance on *Marriage of Serna* (2000) 85 Cal.App. 4th 482, was legal error." AOB 23

(3) "The Court found that [Respondent] had met and fully satisfied his college expenses obligation on the basis of erroneous mathematical calculations. . . . The Court's calculations must be reconcilable with its findings. *Marriage of Weinstein* (1992) 4 Cal.App. 4th 555." AOB 31

(4) "The Court committed legal error when it terminated the 'additional spousal support' for college expenses . . . without actual notice to [Petitioner]." AOB 36

(5) "The Court committed legal error when it relied on *Serna* [(2000) 85 Cal.App. 4th 482] in ruling that it would not consider the educational expenses of the girls in determining spousal support." AOB 39

(6) "The Court artificially increased Melodie's income when it confused income tax deductions with DissoMaster® deductions and did not include a Guideline deduction . . . for the actual amount of her unreimbursed medical expenses . . . " AOB 40

(7) The Court committed legal error, ruled without substantial evidence and abused its discretion when it retroactively reduced [Petitioner's] temporary spousal support because: "The Court refused to include [Petitioner's] alternative therapy/healing costs . . . because

they have 'not been covered nor rerecognized by her medical insurance carrier as covered medical costs . . . " AOB 39, 41

(8) "The Court's calculations [were not] reconcilable with its findings." AOB 44

(c) California Supreme Court

The issues were raised in the California Supreme Court in Petitioner's Petition for Review ("PPR") at pages 12-30, in the comparison of the "reasonable judge" standard and the "legal error" standard that appears *infra* at pp. 11-26, in this brief. The California Supreme Court denied Petitioner's Petition for Review ("PPR"). (App. 88)

(1) "Use of the 'reasonable judge' standard by the Court of Appeal is a denial of due process when the trial court committed legal error . . . " PPR 31

2. Is it a violation of U.S. Constitution, Article VI, Clause 2, for a state court to fine or otherwise punish Petitioner for filing an action in the federal court?

(a) Trial Court

The issues of legal error were raised in the trial courts in the Objections and Motions for New Trial. The trial court denied the Motions for New Trial and overruled the Objections.

Notice of Intention to Move For A New Trial filed 7/22/04 and Respondent's Objections to Proposed Statement of Decision [re Attorney's Fees] filed 7/22/04:

(1) "The court has abused its discretion and made a legally unsupportable finding in its holding that [Petitioner] is not entitled to attorney's fees because of her

conduct . . . in filing the RICO action." Appellant's Appendix 2341 and 2342

(b) Court of Appeal

The issue was raised in the Court of Appeal in Petitioner's Opening Brief and Reply Brief. The Court of Appeal affirmed the trial court's decisions.

(1) "Imposing sanctions under [Marriage of] *Green* [(1992) 6 Cal.App. 4th 584 [7 Cal.Rptr. 2d 872]] and Family Code § 271 creates a chilling effect on plaintiffs' pursuit of legitimate federal remedies." "'The relative importance to the State of its own law is not material when there is a conflict with a valid federal law.'" AOB 47

(2) "The Court ruled that [Petitioner] was not entitled to [attorneys'] fees under Family Code § 2030(a) because she brought a RICO action . . . Neither Family Code § 2030 nor § 2032 prohibits fees from being awarded because the person requesting fees has engaged in bad conduct." AOB 50

(c) California Supreme Court

The issues were raised in the California Supreme Court in Petitioner's Petition for Review. The California Supreme Court denied Petitioner's Petition for Review.

(1) "[The] State court punished [Petitioner] for filing an action in federal court, under the justification of [*Marriage of Green* (1992) 6 Cal.App. 4th 584 [7 Cal.Rptr. 2d 872]. [Petitioner] had to choose between letting the statute of limitations run and being charged with a $30,000 penalty and refused attorneys' fees." PPR 12

B. Comparison of Outcomes Under the "Reasonable Judge" or Legal Error Tests

The Court of Appeal examined the issues under the "reasonable judge," substantial evidence and abuse of discretion tests which are collectively referred to herein as the "reasonable judge" test. It did not examine multiple legal errors. This resulted in a duality of potential findings: under the "reasonable judge" standard (including some instances of the abuse of discretion/substantial evidence tests) some of the findings could be upheld; however, under the legal error standard, the findings were error.

Examples of this duality include:

1. Compliance with Pre-Trial Order vs. Hypothetical Person

In a pre-trial ruling, Respondent was ordered to pay the *full cost* of tuition, room and board and transportation to and from college for the minor or adult children of the parties, as additional spousal support. (App. 48-49) At the time the decision was made, the court relied on the cases of *In re Marriage of Siegel* (1972) 26 Cal.App. 3d 88 [102 Cal.Rptr. 613] and *In re Marriage of Paul* (1985) 173 Cal.App. 3d 913 [219 Cal.Rptr. 318]. **Respondent did not appeal the order.**

It is undisputed that Respondent did not pay the full cost. After the time to appeal expired, but prior to trial, the case of *Marriage of Serna* (2002) 85 Cal.App. 4th 482 [102 Cal.Rptr. 2d 188], was decided. The trial court held that it had to strictly construe the college expenses order because *Serna, supra,* overturned *Paul, supra,* and *Siegel, supra.* (App. 52) The Court of Appeal ruled that Respondent had paid enough, relying on a paper back book (erroneously

described as publications of the colleges) that set forth the estimated expenses of a hypothetical person at colleges in the United States, two of which were the colleges attended by the children of the parties, rather than the actual costs of all three of the parties' children, as required by the court order. The book listed the cost of tuition and estimated but undefined room and board but did not include transportation costs or other costs such as utilities. The court also denied all reimbursement requests for the college expenses of the third child, on the basis that the judge making the original order did not contemplate her attendance at one of the colleges she attended. However, there was no language in the order that would have affected the choice of college, the type of study, the age of the students, nor any other conditions. All of the colleges attended were accredited.

The court also based its decision on mathematical errors. No court reporter was present and the trial court did not create a Minute Order. The Court of Appeal held that it could not consider the issue because the parties had not created a settled statement. However, the errors complained of are legal errors that appear in the record itself, namely, the court's Amended Statement of Decision. (App. 47) Respondent did not comply with the pre-trial order if he paid less than the full cost as set forth in the unappealed court order. Under California Rule of Court 8.163 [effective January 1, 2007, after the Court of Appeal ruling but before the California Supreme Court ruling] "The reviewing court will presume that the record in an appeal includes all matters material to deciding the issues raised. If the appeal proceeds without a reporter's transcript, this presumption applies only *if the claimed error appears on the face of the record.*" [Emphasis added.].

Reasonable Judge Standard

The Court of Appeal affirmed the trial court's decision that Respondent paid enough on the basis of hypothetical costs for a hypothetical student in the paper back book.

Legal Error

The trial court committed legal error when it did not require Respondent to pay the full cost of tuition, room and board and transportation.

Further, the trial court committed legal error when it denied certain requested reimbursements on grounds that required the trial court to read the mind of the judge who made the original order or to rely on the reporter's transcript, rather than the language of the order itself. *Whittington v. McKinney* (1991) 234 Cal.App. 3d 123 [285 Cal.Rptr. 586]; *Marriage of Ditto* (1988) 206 Cal.App. 3d 643, 646-647 [253 Cal.Rptr. 770], citing *Buckhantz v. R.G. Hamilton & Co.* (1945) 71 Cal.App. 2d 777, 781 [163 P.2d 756].

It also was legal error to give Respondent the benefit of *Serna, supra*, because he did not appeal the original order. *Marriage of Wodicka* (1976) 17 Cal. 3d 181 [550 P.2d 1051; 130 Cal.Rptr. 515] and *Marriage of Maxfield* (1983) 142 Cal.App. 3d 755 [191 Cal.Rptr. 267]. Respondent also never asserted in his briefs that the pre-trial order was erroneous. Consequently, that order must be affirmed and enforced under its terms. *Richard v. Richard* (1954) 123 Cal.App. 2d 900, 903 [267 P.2d 867].

The trial court and the Court of Appeal gave Respondent the benefit of *Serna, supra,* indirectly through "strict construction" when they could not give it directly.

The trial court calculated the amount paid by Respondent by crediting him with more than he had actually paid. The trial court calculated the amount paid by Petitioner by crediting her with less than she had actually paid. Reliance on these mathematical errors is legal error. *Marriage of Weinstein* (1992) 4 Cal.App. 4th 555 [5 Cal.Rptr. 2d 558]. The mathematical errors are apparent in the comparison of the accounting and the trial court's findings.

The court denied every one of Petitioner's requests for reimbursement – even though they were in the categories of the original order. Her accounting showed all of her payments but she requested reimbursement only for the categories of tuition, room and board and transportation to and from. The Court of Appeal affirmed the trial court's rulings.

The Court of Appeal affirmed the trial court's decision in part because Petitioner did not file a reporter's transcript, settled statement or agreed statement, in that none of those existed, citing *McKay v. Longsworth* (1989) 211 Cal.App. 3d 1592, 1594 [260 Cal.Rptr. 250]. (App. 19-21) However, so long as the legal error appears on the face of the court's Amended Statement of Decision (App. 47), as it does here, that is sufficient. *Slavin v. Borinstein* (1994) 25 Cal.App. 4th 713 [30 Cal.Rptr. 2d 745] and *Marriage of Ditto, supra,* 206 Cal.App. 3d 643.

2. Modification of Temporary Support

The trial court limited Petitioner's unreimbursed medical expenses (although prescribed by her physician) to $695 which is the amount in excess of 7.5% of her adjusted gross income. (App. 81) This is in contradiction to the requirement of consideration of actual costs as required

under California Family Code § 4320 (App. 93), which were $1,962.83 per month.

Based on the reduced medical expenses and elimination of the college costs, the Court reduced temporary support from $1,379 to $379 per month, creating income tax ramifications. Respondent had received a tax benefit from deducting the previous $1,379 per month payment on his income tax returns and Petitioner had received and paid a tax liability. With an order reducing support back to February 15, 2002, Petitioner would not be able to amend her tax returns.

Reasonable Judge Standard

The Court of Appeal affirmed, holding that it was not an abuse of discretion to limit the medical expenses to $695. (App. 8)

Legal Error

The Court of Appeal did not review or rule on the legal error question of whether the trial court could limit Petitioner's medical obligations to the amount she could deduct on her tax return after reductions based on her adjusted gross income – which was artificially high because she had sold property in order to pay the college expenses that Respondent was supposed to pay – thereby limiting the tax deduction for the medical expenses. Federal tax law created an inaccurate picture of Petitioner's needs and her ability to pay for them, an arbitrary limit to her actual obligations, and punished her twice for Respondent's failure to pay the college expenses: once when she had to sell her assets to pay these expenses herself, and again when she sought support.

The decisions of the trial and appellate court are legal error. The trial court is required to consider the tax ramifications of its decision under California Family Code § 4320(j) and is required to consider the components of California Family Code § 4320(e) (App. 93): "The **obligations** and assets, including the separate property, of each party." Instead of basing its decision on Petitioner's obligations, the trial court based its decision on her tax deduction.

Failure to comply with California Family Code § 4320(e) (App. 93) constitutes legal error.

3. Courts Practicing Medicine

Petitioner suffers from a **very rare**, progressively debilitating neuromuscular disease that **has no cure**, is usually terminal and is extremely painful. Petitioner is allergic to all pain medications except Tylenol. There are times when Petitioner screams and writhes in pain for days. Her **physician prescribed** "alternative" medical care to teach her how to control pain without medication.

Reasonable Judge Standard

Of the $1,962.83 medical expenses total, approximately $800 per month was for alternative medical care. The trial court did not specifically rule as to how much of this was excluded in the court's calculations. The trial court held that it would not consider Petitioner's medical expenses that were not paid by insurance because they were not paid by insurance. (App. 55, App. 7) The Court of Appeal stated that no medical literature or other evidence was presented at trial to establish that the alternative care was indicated for Petitioner's disease. (App. 8)

Legal Error

The Court of Appeal should not have ruled on the medical literature issue because it **was not presented at trial and was neither briefed nor argued before the Court of Appeal**, which also did not offer Petitioner and Respondent the opportunity to brief and argue the issue. By statute, California gives litigants the right to be heard on an issue before an appellate court may decide the issue:

> "Before the Supreme Court, a court of appeal, or the appellate division of a superior court renders a decision in a proceeding other than a summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, **the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing.** If the court fails to afford that opportunity, **a rehearing shall be ordered** upon timely petition of any party." California Government Code § 68081 (emphasis added). See also *Adoption of Alexander S.* (1988) 44 Cal. 3d 857 [750 P.2d 778; 245 Cal.Rptr. 1].

Petitioner filed a Petition for Rehearing and it was denied. (App. 87)

In addition, the trial court did not make findings sufficient to exclude the obligations of Petitioner for alternative medical care. Under the legal error standard, the trial court could not make its own independent medical decisions about the necessity or propriety of medical care that has been prescribed by a physician. If a physician prescribes a treatment, that alone should create a presumption that must be rebutted by the opposition as to why the treatment is unnecessary. The court committed legal error when it overruled Melodie's physicians and

determined this medical care was not necessary. Witkin, *California Procedure 4th,* Vol. 2, Jurisdiction § 276, citing *San Francisco v. Superior Court* (1959) 53 Cal. 2d 236, 243 [1 Cal.Rptr. 158]. There is no requirement on the face of California Family Code § 4320 (App. 93) that the decisions of physicians must be supported by medical literature in order to be considered. What if – as in this case – the disease is so rare that there is no medical literature? California Family Code § 4320(e) (App. 93) is clear on its face.

4. California Family Code § 4320 Factors and Setting Permanent Support

The trial court reduced Petitioner's spousal support to jurisdictional/nominal in a marriage of almost 22 years, despite Petitioner's inability to work due to her permanent and total disability. The trial court ruled that Respondent has the ability to pay and that his lifestyle has not changed significantly since separation. The court ruled Petitioner had the ability to support herself because she had $175,000 in assets. However, if her debts were considered, she had a negative net worth. The trial court ruled that Petitioner's expenses were less than half of her listed expenses but the Court of Appeal demonstrated that Petitioner's expenses exceeded her income by $4,693 per month.

Reasonable Judge Standard

The Court of Appeal affirmed setting permanent support at jurisdictional/nominal despite its own differing calculations of Petitioner's needs and the fact that the trial court's calculations of her ability to support herself

included only her assets and not her debts. This would seem to fail even under the "reasonable judge" standard.

Legal Error

The trial court found that Petitioner was permanently and totally disabled, was unable to work (App. 58, 61), had substantial credit card and other debt (App. 63), and, on the basis of calculating only her assets and not her debts, found she had assets of $175,000. (App. 62) However, Petitioner had a negative net worth. California Family Code § 4320(e) (App. 93) requires the trial court, and the Court of Appeal, to consider both assets and obligations. California Family Code § 4320 (App. 93) does not allow the court to refuse support on the basis of bad faith.

5. Attorneys' Fees Under California Family Code § 2030 and Bad Conduct

The Court of Appeal affirmed the denial of attorneys' fees to Petitioner under California Family Code § 2030 (App. 90) due to alleged "bad faith" because she filed an action in federal court against Respondent and others related to their hiding the sale of the Clinic. (App. 27) This is legal error. California Family Code § 2030 (App. 90) requires attorneys' fees be paid in order to put the parties on equal footing, irrespective of conduct. The trial court did not rule on the question of whether fees could be paid under California Family Code § 2032 (App. 91), but the Court of Appeal cited that section in support of its ruling that Petitioner's bad faith was sufficient reason to deny attorneys' fees because she filed an action in federal court.

Reasonable Judge Standard

The trial court denied attorney's fees to Petitioner because she acted in bad faith by filing an action in federal court. The trial court further found that Petitioner had the ability to pay a $120,000 attorneys' fees bill (App. 69, 79) even though she did not have the ability to pay a $30,000 fine for filing the federal court action. (App. 78) The Court of Appeal affirmed.

Legal Error

The trial court could not determine that Petitioner should be denied attorneys' fees for bad faith under California Family Code § 2030 (App. 90) or § 2032 (App. 91) Only California Family Code § 271 (App. 89) sets forth the specific categories of "bad faith"; no categories of "bad faith" are contained in either §§ 2030 (App. 90) or 2032 (App. 91) Their purpose is to give the parties an equal playing field, as set forth in the title.

California Family Code § 2030 (App. 90) is a mandatory statute. The failure to comply with the requirements of a mandatory statute invalidates the order. 1A Sutherland, *Statutory Construction* (6th ed. 2000), Mandatory, Directory, Prohibitory and Permissive Statutes, ¶25:3, pp. 604-610.

Section 2030 (App. 90) provides in part:

> "In a proceeding for dissolution of marriage, nullity of marriage, or legal separation of the parties, and in any proceeding subsequent to entry of a related judgment, the court **shall** ensure that each party has access to legal representation to preserve each party's rights by ordering, if necessary based on the income and needs assessments, one party . . . to pay . . . whatever amount is reasonably necessary for attorney's fees and for the

> cost of maintaining or defending the proceeding during the pendency of the proceeding."

The word "shall" indicates a mandatory intent. Sutherland, *supra*, ¶25:4, p. 610.

The Court of Appeal justified its decision to refuse attorneys' fees under California Family Code § 2030 (App. 90) for bad faith on the basis of the word "may" in California Family Code § 2032(a) (App. 91), which provides:

> (a) The court may make an award of attorney's fees and costs under Section 2030 or 2031 where the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties.

The standard for what is "just and reasonable" is set forth in Family Code § 2032(b) (App. 91):

> (b) In determining what is just and reasonable under the relative circumstances, the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in Section 4320. The fact that the party requesting an award of attorney's fees and costs has resources from which the party could pay the party's own attorney's fees and costs is not itself a bar to an order that the other party pay part or all of the fees and costs requested. Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their relative circumstances.

However, even the permissive word "may" is interpreted as mandatory when the duty is imposed upon a

public official and his act is for the benefit of a private individual. Sutherland, *supra,* pp. 610-614, citing *Harless v. Carter* (1954) 42 Cal. 2d 352 [267 P.2d 4], followed in *People v. Ledesma* (1997) 16 Cal. 4th 90, 95 [939 P.2d 1310; 65 Cal.Rptr. 2d 610], and *Mass v. Board of Education* (1964) 61 Cal. 2d 612, 623 [394 P.2d 579; 39 Cal.Rptr. 739].

Statutes that are clear and unambiguous are not subject to construction by the courts. The plain meaning of terms is used, absent statutory definition. 3A Sutherland, *Statutory Construction* (6th ed. 2000), Statutes Relating to Domestic Relations, § 69:10, pp. 426-432, citing *Marriage of Chapman* (1988) 205 Cal.App. 3d 253 [252 Cal.Rptr. 359]. Other statutes dealing with the same subject [such as § 2032 (App. 91) as the one being construed [§ 2030 (App. 90)] may not be resorted to for interpretation if the one being construed is clear and unambiguous. 2B Sutherland, *supra*, Interpretation by Reference to Related Statutes, § 51.01, pp. 170-176, citing *Guelfi v. Marin County Employees' Retirement Association* (1983) 145 Cal.App. 3d 297, 349 [193 Cal.Rptr. 343]: "[T]he fundamental rule is that resort to extrinsic aids [statutes other than the one being interpreted], including statutes *in pari material*, in the construction of a statute is appropriate only where the statute, taken alone, is ambiguous or unclear." See also, *Hernandez v. Imperial Irrigation District* (1967) 248 Cal.App. 2d 625, 626 [56 Cal.Rptr. 811]: "The meaning of a statute is determined from its language considered as a whole. [citations] The language expresses the intention of the Legislature in the premises [citation]; where free from doubt, ambiguity or uncertainty, [it] leaves no room for construction . . . and must be followed even though it may appear from other sources the Legislature had a different object in mind." See also, *Poway Unified School District v. Jih Jung Chow* (1995) 39 Cal.App. 4th 1478, 1482 [46

Cal.Rptr. 2d 651], and *People v. Honig* (1996) 48 Cal.App. 4th 289, 327 [55 Cal.Rptr. 2d 555].

It is presumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter. In the absence of any express repeal or amendment, the new provision is presumed in accord with the legislative policy embodied in those prior statutes. Thus, they all should be construed together. Sutherland, *supra*, § 51.02, pp. 176-178.

There is no provision authorizing the court to deny fees under California Family Code §§ 2030 (App. 90) and 2032 (App. 92) on the basis of bad faith. In contrast to the specific language of § 2030 (App. 90), § 2032 (App. 91) is in general language. California Code of Civil Procedure § 1859 provides that when a general and a particular provision are inconsistent, the particular provision is paramount to the general one.

6. Implicit Notice of Motion

The Appellate Court affirmed that implicit notice of a motion is sufficient. (App. 23)

Reasonable Judge Standard

The request to reduce the regular support order of $1,379 to jurisdictional/nominal implicitly included cancellation of the support for college expenses.

Legal Error

"[W]hen a person has a legally enforceable right to receive a government benefit provided certain facts exist, this right constitutes a property interest protected by due

process." *Goldberg v. Kelly* (1970) 397 U.S. 254, 261-262 [90 S. Ct. 1011; 25 L. Ed. 2d 287].

Spousal support is a right provided under California Family Law §§ 4330(a), 4332 and 4320. The ruling that the notice was implicit amounted to an admission that it was not explicit. Respondent testified that he could not find notice of a request to terminate the college support obligations on the face of the motion, although it was his intent to terminate both. The "regular" support obligation order was in the amount of $1,379 per month, and that was the only order that was set forth on the notice as the one for which Respondent requested a reduction to jurisdictional/nominal. The college support order was the "additional" support order. The "regular" support obligation and the "additional" spousal support orders were not affected by each other; each operated independently. If the notice had requested the reduction of the "additional" spousal support order to jurisdictional/nominal, without specific notice the trial court could not have held that the $1,379 per month order was implicitly part of the college support order and thereby reduced it to zero.

Notice of a motion is required to be explicit. *Marriage of Rosenthal* (1961) 197 Cal.App. 2d 289 [17 Cal.Rptr. 186]. "Notice is fundamental to due process." Witkin, *Summary of California Law, 10th ed.,* Vol. 7, Constitutional Law § 638, citing *Lambert v. California* (1957) 355 U.S. 225 [78 S. Ct. 240; 2 L. Ed. 2d 228]; *People v. Swink* (1984) 150 Cal.App. 3d 1076, 1079 [198 Cal.Rptr. 290]. This is particularly true under the California Constitution. Witkin, *Summary of California Law, 10th ed.,* Vol. 7, Constitutional Law § 615, citing *Ryan v. California Interscholastic Federation,* (2001) 94 Cal.App. 4th 1048, 1069 [114 Cal.Rptr. 2d 798].

"Notices must be in writing, and the notice of a motion must state . . . the *grounds* upon which it will be made . . . " California Code of Civil Procedure § 1010. [Emphasis added.] "*A total failure to state the grounds of the motion is a fatal defect.*" [Emphasis added.] Witkin, *California Procedure 4th,* Vol. 6, Proceedings Without Trial § 9, citing *Traders Credit Corp. v. Superior Court* (1931) 111 Cal.App. 663, 665 [296 P. 99]. Only the grounds specified in the notice of motion may be considered by the court. Witkin, *supra,* citing *Westphal v. Westphal* (1943) 61 Cal.App. 2d 544, 550 [143 P.2d 405]; *Castagnoli v. Castagnoli* (1954) 124 Cal.App. 2d 39, 41 [268 P.2d 37]; *Taliaferro v. Riddle* (1959) 167 Cal.App. 2d 567, 570 [334 P.2d 950]; *Gonzales v. Superior Court* (1987) 189 Cal.App. 3d 1542 [235 Cal.Rptr. 106]. In *Gonzales*, the court explained, "It is elemental that a notice of motion must state in writing the 'grounds upon which it will be made.'" Checking "jurisdictional/ nominal" does not state the grounds of the motion; it merely states the requested result. Other cases have held that affidavits accompanying a notice of motion (*Hecq v. Conner* (1928) 203 Cal. 504, 506 [265 P. 180]; *Savage v. Smith* (1915) 170 Cal. 472, 474 [150 P. 353]; *Giandeini v. Ramirez* (1936) 11 Cal.App. 2d 469, 475 [54 P.2d 91]; *Shields v. Shields* (1942) 55 Cal.App. 2d 579, 583-584 [130 P.2d 982]), other documents in the court file (*Reher v. Reed* (1913) 166 Cal. 525, 527 [137 P. 263]), or affidavits and points and authorities filed with the notice (*Ramey v. Myers* (1958) 159 Cal.App. 2d 82, 85-86 [323 P.2d 805]), at least when specifically referred to in the notice, may be considered in amplification of the grounds stated in the notice. However, there were no affidavits, other documents in the court file or affidavits and points and authorities filed with the notice that stated Respondent sought to

terminate the "additional spousal support on college expenses."

7. Gross Disparity Between Assets/Income of Respondent and Petitioner

The Court of Appeal affirmed the reduction of permanent spousal to jurisdictional/nominal even though by the Court of Appeal's own calculations, Petitioner's expenses exceeded income by thousands of dollars (App. 13), she had a negative net worth, Respondent's expenses were thousands of dollars less than his income and he had a net worth of $2.4 million.

Reasonable Judge Standard

The Court of Appeal affirmed that permanent spousal support could be reduced to jurisdictional/nominal.

Legal Error Standard

It is legal error to reduce permanent spousal support to jurisdictional/nominal when there was such a disparity between the economic standing of Respondent and Petitioner. Respondent cannot have a much higher continued standard of living than Petitioner and she is entitled to the same standard of living that the parties shared at the time of separation. *Marriage of Andreen* (1978) 76 Cal.App. 3d 667 [143 Cal.Rptr. 94] and *Marriage of Ostler & Smith* (1990) 223 Cal.App. 3d 33 [272 Cal.Rptr. 560].

The Court found that Respondent had an undefined ability to contribute to the support of Petitioner if she needed it but noted that if she had not spent her money on the education of the adult children, in violation of *Marriage of Serna*, *supra*, 85 Cal.App. 4th 482, she would have

enough to "meet her needs." (App. 65-66) Respondent was not legally entitled to benefit from *Serna, supra, Marriage of Wodicka* (1976) 17 Cal. 3d 181 [550 P.2d 1051; 130 Cal.Rptr. 515]. When the trial court and the Court of Appeal both ruled that Respondent had paid enough, Petitioner was denied reimbursement and was further punished for paying the college expenses by being denied spousal support.

REASONS FOR GRANTING THE WRIT

I. DUE PROCESS, THE REASONABLE JUDGE AND THE SUPREMACY CLAUSE

The trial court committed legal error in many instances. Use of the "reasonable judge" standard and accepting every ruling simply because it was made is a denial of due process. The Court of Appeal is required to examine the trial court's decisions on the basis of the decisions themselves and not on the basis of a hypothetical judge in a hypothetical case with hypothetical facts and law.

This head on collision between the "reasonable judge" or "any reasonable evidence will do" standard and the commission of legal error is common in both civil and criminal cases and it affects the very core of the judicial system. What is a reasonable judge? What exactly is the purpose of obtaining a court order if the trial court can simply ignore it, or rewrite it in enforcement proceedings, under the "reasonable judge" standard, even if the order was not appealed? At what point is the order *res judicata*? To what degree are parties entitled to detrimentally rely on an unappealed court order? To what degree can one judge subsequently amend a court order made by a previous judge by emasculating it when enforcement is requested? When

does litigation end? Is it legally permissible for the trial court to turn an unappealed court order into a court suggestion? Is a litigant entitled to receive indirectly the benefits of subsequently decided cases through "strict construction" when he/she is not able to receive them directly because the original order was not appealed? Unpaid judgments can be renewed. How far after the original, unappealed court order is made, or judgment rendered, can the courts give the benefits of subsequently decided cases? What if it is a jury trial that created the original decision and the enforcing court does not agree with the jury? Can it refuse to enforce the jury's verdict? Is it legal error for the court to refuse to enforce a valid, unappealed court order? Does legal error matter?

For the reasons shown above in the discussions of legal error, due process requires an objective analysis of legal error. It also requires an objective test as to what a "reasonable" judge is. Further, the Supremacy Clause requires that State Courts not fine or punish persons simply because they are litigants in federal courts. Finally, due process also requires notice, an opportunity to be heard and a meaningful remedy when deprived of those.

II. THE NEED FOR REVIEW BY THE UNITED STATES SUPREME COURT IS COMPELLED BY THE LACK OF A REMEDY OUTSIDE OF THIS COURT

A. The Lack of Remedy Outside of This Court Further Violates Petitioner's Due Process Rights.

The California Supreme Court is permitted by rule to grant review in only very limited circumstances. Violation

of a party's federal constitutional rights by an appellate court is not among them:

The Supreme Court may order review of a Court of Appeal decision:

(1) when necessary to secure uniformity of decision or to settle an important question of law;

(2) when the Court of Appeal lacked jurisdiction;

(3) when the Court of Appeal decision lacked the concurrence of sufficient qualified justices; or

(4) for the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order. California Rules of Court, Rule 8.500(b).

Supreme Court review lies only from the Court of Appeal decision and not from the trial court decision. Further, review is limited primarily to issues the court deems to be important public policy issues or to resolve court of appeal decisional conflicts. Eisenberg, *et al.*, The Rutter Group, *California Practice Guide*, Civil Appeals and Writs (2006) §§ 13:4 and 13:11.

California's court structure is such that any person deprived of due process is dependent entirely on the whim of the same appellate court that violated the due process principles in the first place. That leaves litigants with no forum in which to enforce their due process rights if the Court of Appeal refuses to do so.

Where a litigant has raised constitutional issues "it was the province and duty of the state courts to decide them." *Rooker v. Fidelity Trust Co.* (1923) 263 U.S. 413, 415 [44 S. Ct. 149; 68 L. Ed. 362]. A state court may not deny a federal right in the absence of a "valid excuse" because the "existence of the jurisdiction creates an implication of duty to exercise it." *Howlett v. Ros* (1990)

496 U.S. 356, 369-370 [110 S. Ct. 2430; 110 L. Ed. 2d 332]. As this Court said in *Kenney v. Supreme Lodge of the World, LOM* (1920) 252 U.S. 411, 415 [40 S. Ct. 371; 64 L. Ed. 638] "it is plain that a State cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to Courts otherwise competent."

Such violations of federal constitutional rights, unremedied by the state courts, are the traditional context of this Court's appellate jurisdiction. *Angel v. Bullington* (1947) 330 U.S. 183, 188-189 [67 S. Ct. 657, 660-661; 91 L. Ed. 832, 836-837]. Where jurisdictional rules are relied on by the courts as a ground for declining to consider constitutional claims properly before them, in apparent violation of a legislative command, it is left to this Court to enforce constitutional requirements. *Cf. Bush v. Gore* (2000) 531 U.S. 98, 115 [121 S. Ct. 525, 535; 148 L. Ed. 2d 388, 405] (Rehnquist, C.J., concurring).

Because California does not provide any meaningful avenue for review of due process violations, and its courts refused even to consider the issues when raised by petitioner, the intervention of this Court is appropriate. Without it, due process rights in California are unenforceable and every case can be decided on the basis of the hypothetical reasonable judge as opposed to commission of legal error.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MELODIE KLEIMAN
Petitioner, Attorney at Law, In Pro Per

June 12, 2007

2006 WL 3742864

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THEODORE KLEIMAN,

Respondent,

v.

MELODIE KLEIMAN,

Appellant.

2d Civil No. B185586
(Super Ct. No. D229386)
(Ventura County)

(Filed Dec. 21, 2006)

In this marital dissolution action, Melodie Kleiman appeals from a further judgment on reserved issues entered on July 22, 2005. Appellant contends that the trial court erroneously (1) reduced her temporary spousal support from $1,379 to $379 per month; (2) denied her permanent spousal support; (3) denied her claim for reimbursement of college expenses that she had paid on behalf of the parties' three daughters; (4) modified, without proper notice, a prior order directing Theodore Kleiman (respondent) to pay the daughters' college expenses; (5) modified spousal support

without a showing of a material change in circumstances; and (6) refused to award her attorney's fees. We affirm.

Factual and Procedural Background

The parties were married in October 1972. They have three daughters: Marjorie T'Anne (hererafter [sic] T'Anne), born in July 1975; Sarah, born in June 1976; and Alexis, born on the same date as Sarah.

In November 1994 appellant petitioned for legal separation. In December 1994 a judgment of legal separation was entered. The judgment incorporated a marital settlement agreement (MSA). In January 1995 respondent petitioned for dissolution of the marriage.

In June 1995 appellant moved to set aside the judgment of legal separation and the MSA. In August 1995 the parties stipulated that the judgment and MSA should be set aside, but the stipulation was not filed until April 1998. A judgment of dissolution as to status only was entered on September 14, 1995.

In November 1996 the trial court ordered respondent to pay appellant temporary spousal support of $1,379 per month. Respondent was also ordered to pay appellant's attorney's fees of $10,000. In addition, the trial court ordered respondent to pay, as additional spousal support, the college expenses of his daughters after the depletion of a college trust fund (hereafter the college fund) established by the parties during the marriage.

In April 1999 the trial court issued an order clarifying respondent's obligation to pay his daughters' college expenses. The order provides: "Upon the expenditure of all monies in the [college fund], [respondent] shall pay as and

for additional spousal support, the full college expenses of the minor or the adult daughters of the parties. 'College expenses' are defined as tuition, room and board, and transportation to and from."

In July 2001 a judgment on reserved issues was entered. The judgment incorporates an MSA executed by the parties in 2000. The MSA divided the parties' community property and confirmed their separate property. The MSA reserved for later determination the issues of spousal support, payment of college expenses, and payment of attorney's fees and costs.

Appellant claimed that she was entitled to reimbursement from respondent for college expenses that she had paid on behalf of her daughters. On July 18, 2003, a trial was conducted on this issue. Following the trial, the court denied appellant's claim for reimbursement.

On February 15, 2002, respondent filed a notice of motion for modification of spousal support. On September 18 and 19, 2003, a trial was conducted on this issue. The trial court determined "that no additional spousal support in the form of educational expenses for the adult children is to be ordered." Effective March 1, 2002, the trial court modified temporary spousal support by reducing it from $1379 to $379 per month. Effective October 1, 2003, permanent spousal support was ordered "to be reduced to zero." However, because the marriage was long term and appellant's health was deteriorating, the court reserved jurisdiction over the issue of spousal support.

On April 30, 2004, a trial was conducted on the issue of attorney's fees. The trial court refused to award appellant any attorney's fees in addition to the $10,000 awarded in November 1996.

Temporary Spousal Support

Effective March 1, 2002 and until October 1, 2003, the trial court modified temporary spousal support by reducing it from $1,379 to $379 per month. Appellant contends that the trial court erred in ordering this reduction.

"We . . . review temporary spousal support orders under the abuse of discretion standard. [Citation.]" (*In re Marriage of Wittgrove* (2004) 120 Cal.App.4th 1317, 1327.) "'"Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion. . . ." (*Silver v. Boatwright Home Inspection, Inc.* (2002) 97 Cal.App.4th 443, 449.)

"Generally, temporary spousal support may be ordered in 'any amount' based on the party's need and the other party's ability to pay. [Citation.] 'Whereas permanent spousal support "provide[s] financial assistance, if appropriate, as determined by the financial circumstances of the parties after their dissolution and the division of their community property," temporary spousal support "is utilized to maintain the living conditions and standards of the parties in as close to the status quo position as possible pending trial and the division of their assets and obligations." [Citations.]' [Citation.] The court is not restricted by any set of statutory guidelines in fixing a temporary spousal support amount. [Citation.] [¶] Rather, in exercising its broad discretion, the court may properly consider the 'big picture' concerning the parties assets and income available for support in light of the marriage standard of living. [Citation.] . . . Trial courts may properly look to the parties' accustomed marital lifestyle as the

main basis for a temporary support order. [Citations.]" (*In re Marriage of Wittgrove, supra,* 120 Cal.App.4th at p. 1327.)

In calculating the modified amount of temporary spousal support, the trial court entered financial information into a DissoMaster computer program. The DissoMaster program "calculate[s] temporary spousal support as provided by local rules for the ordinary case. The benefit of the program[ ] is that [it] enable[s] a family law judge to input appropriate factual information about the income of the parties and have temporary spousal support computed in accordance with local rules, automatically taking into account the tax consequences of the order to each party. Unusual factors affecting temporary spousal support . . . require the judge to make adjustments to the calculations made by the basic computer program." (*In re Marriage of Olson* (1993) 14 Cal.App.4th 1, 5, fn.3.)

In its amended statement of decision, the trial court explained how it had arrived at the figures entered into the DissoMaster program. The court principally relied upon the parties' 2002 federal and state income tax returns. Appellant disputes the validity of the trial court's figures. She contends that the trial court erred in failing (1) "to deduct $1,300 per month from her pension plan income of $5180"; (2) "to include the actual cost of [appellant's] unreimbursed medical expenses"; (3) "to accurately state the cost of unreimbursed traditional medical care costs"; (4) "to include [appellant's] alternative medical care expenses because they were not covered by her medical insurance"; (5) "to include the correct amount of [appellant's] medical insurance costs"; and (6) to include "a payment on [respondent's] deferred compensation plan buyout of $20,114, or $1,676 per month."

In her opening brief, appellant claims that she was entitled to the $1,300 deduction from her monthly pension income "because it [the $1,300] had already been included in the calculations for the property valuation and distribution." Appellant cites no evidence in the record to support this allegation. Even if the $1,300 had been so included, appellant fails to explain why she would have been entitled to the deduction.

In her reply brief, appellant argues that she was entitled to the $1,300 deduction because this amount was the "retirement" portion of her pension, and "[t]he retirement portion is return of principal." Appellant alleges: "The Court is not permitted to order spousal support based on investment principal; only investment income is considered available for support."

We need not decide whether appellant would be entitled to a $1,300 deduction if this amount were a return of principal. In its amended statement of decision, the trial court properly determined that there was "insufficient evidence" that $1,300 of her pension plan income was a return of principal. In support of her argument, appellant cites page 272 of volume 3 of the Reporter's Transcript. This page includes testimony by appellant that she believed "the retirement component" of her pension plan income to be $1,300 per month. Appellant did not testify that the retirement component was a return of principal, and she does not cite any documentary evidence to that effect.

Moreover, in her trial brief appellant acknowledges that "the distribution of principal assets" from her retirement accounts would be taxable. Thus, if $1,300 per month of her pension income were return of principal,

$15,600 of that income should have been included as taxable income on her 2002 federal income tax return. The trial court noted: "The tax returns filed reflect that only $1,300, for the entire year of said benefits were taxable, and have been included as taxable income." Thus, the trial court did not err in refusing to deduct $1,300 from appellant's monthly pension income.

As to unreimbursed medical expenses, appellant contends that the trial court abused its discretion in not allowing her a deduction of $23,554 ($1963 per month), which is the amount of unreimbursed medical expenses claimed by her in Schedule A (itemized deductions) of her 2002 federal tax return.[1] Instead, the court allowed her a deduction of $1,569 per month ($249 for health insurance, $695 for other medical expenses, and $625 for extraordinary health expenses). The trial court refused to allow her a deduction for all of her claimed expenses because "the approximate amount of $9,500.00 was for non-traditional, alternative medicine therapy and/or treatment. . . . [Appellant] acknowledged that this type of treatment/therapy has not been covered nor recognized by her medical insurance carrier as covered medical costs."

According to appellant, her alternative medical therapy involved "learning visualization techniques and meditation, learning how to go into an altered state to try and alter my body, and things of that sort." To learn these techniques, she had traveled to The Monroe Institute in Virginia. Appellant testified: "At The Monroe Institute I learned how to leave my body and come back. So when I

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[1] Appellant estimated that her annual reimbursed medical expenses are between $250,000 and $500,000.

am in extreme pain I can separate the energy part of my body from the physical part of my body and not feel the pain. It also has enabled me to actually alter the energy within my body by learning how to leave and come back." Appellant also testified that, as additional alternative medical therapy, she "get[s] a massage once a week" to help "remove the toxins I cannot remove through exercise."

The trial court did not exceed the bounds of reason in disallowing a deduction for the full cost of appellant's alternative medical therapy. No evidence was presented that such therapy has been recognized or approved in the medical literature as treatment for appellant's condition.

As to the amount of health insurance, appellant claims that she was entitled to a deduction of $529.39. The trial court allowed her $249. In her Income and Expense Declaration filed on June 27, 2003, appellant declared that she paid $529.39 per month for health insurance. But appellant also declared that the figure of $529.39 includes health insurance for T'Anne at a cost of $270.47 per month. In determining the amount of the allowable deduction for health insurance, the trial court apparently excluded the cost of T'Anne's insurance. The difference between $529.39 and $270.47 is $259, exactly $10 more than the health insurance figure of $249 entered into the DissoMaster program.

The trial court did not act unreasonably in excluding the cost of health insurance for T'Anne, who was 27 years old when appellant's Income and Expense Declaration was filed. In any event, appellant has failed to show that entry of the $529.39 figure would have increased the amount of temporary spousal support pursuant to the DissoMaster program.

As to the alleged "payment on [respondent's] deferred compensation plan buyout of $20,114, or $1,676 per month," in her opening brief appellant cites no evidence in the record to support this allegation. In her reply brief, appellant cites respondent's 2001 federal tax return without indicating where in the return the buyout income is evidenced. Our review of the return does not disclose income from the buyout. (Respondent's Exhibit G.) Moreover, respondent's 2001 tax return does not cover the period for the modification of temporary spousal support, which was from March 1, 2002 to October 1, 2003.

Accordingly, appellant has not met her burden of showing that the trial court abused its discretion in reducing temporary spousal support from $1,379 to $379 per month.

Permanent Spousal Support

Appellant contends that, effective October 1, 2003, the trial court erroneously denied her permanent spousal support. We review permanent spousal support orders for abuse of discretion. (*In re Marriage of McTiernan and Dubrow* (2005) 133 Cal.App.4th 1090, 1106.)

In exercising its discretion, "the trial court *must* consider and weigh all of the circumstances enumerated in [Family Code section 4320],[2] to the extent they are relevant to the case before it. [Citations.] The first of the enumerated circumstances, the marital standard of living, is relevant as a reference point against which the other

[2] All statutory references are to the Family Code unless otherwise stated.

statutory factors are to be weighed. [Citations.] The other statutory factors include: contributions to the supporting spouse's education, training, or career; the supporting spouse's ability to pay; the needs of each party, based on the marital standard of living; the obligations and assets of each party; the duration of the marriage; . . . the age and health of the parties; tax consequences; the balance of hardships to the parties; the goal that the supported party be self-supporting within a reasonable period of time; and any other factors deemed just and equitable by the court. [Citation.]" (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 302-304.)

"In balancing the applicable statutory factors, the trial court has discretion to determine the appropriate weight to accord to each. [Citation.] But the 'court may not be arbitrary; it must exercise its discretion along legal lines, taking into consideration the applicable circumstances of the parties set forth in [the statute], especially reasonable needs and their financial abilities.' [Citation.] Furthermore, the court does not have discretion to ignore any relevant circumstance enumerated in the statute. To the contrary, the trial judge must both recognize and *apply* each applicable statutory factor in setting spousal support. [Citations.]" (*In re Marriage of Cheriton, supra,* 92 Cal.App.4th at p. 304.)

Here the trial court, in a detailed amended statement of decision, recognized and applied each applicable statutory factor in determining the issue of permanent spousal support. The court stated as follows:

The parties' marriage, which lasted approximately 21 years, 8 months, was of long duration. "At the time of . . . separation and the division of community asets [sic]

[appellant] estimated the total value of the community estate to be worth approximately $3,200,000.00 of which her one-half share amounted to $1,600,000.00."

Respondent is 58 years old and is presently employed as a physician with gross earnings of approximately $10,000 per month. "[T]he community did not incur educational expenses for [respondent] to become a licensed physician." In addition to his earnings, respondent receives interest, dividends, and rental income. According to respondent's declaration dated June 26, 2003, his average monthly expenses were approximately $7,300. However, at the time of trial on the spousal support issue, his expenses had been reduced by approximately $2,170.

Respondent remarried and moved to South Dakota. His new wife is also employed as a physician. Respondent suffers from health problems, but they have not precluded him from practicing his profession.

Appellant is 58 years old. During the marriage, she was employed as an attorney. She suffers from various ailments that have rendered her permanently disabled. Appellant receives social security disability benefits of $1,417 per month and disability retirement benefits of $5,050 per month.[3] In 2002 only $1,300 of the retirement benefits were taxable. The community did not incur educational expenses for appellant to become an attorney.

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[3] These figures in the court's amended statement of decision conflict with the figures in appellant's Income and Expense Declaration filed on June 27, 2003. According to the declaration, during the prior 12 months she had received social security benefits of $17,472.00 ($1,456 per month) and disability retirement benefits of $63,788.16 ($5,315.68 per month), for an annual total of $81,260.16.

Before appellant became disabled, she was earning approximately $80,000 per year.

When the parties separated, they "enjoyed a high middle-income lifestyle. The parties had a very comfortable life style in which they were able to purchase a home in an upper-income neighborhood, make contributions to a 401k and/or retirement plans through their respective employment, make contributions to charity and also save approximately $75,000.00 for their children's college education." Appellant "did not make extravagant purchases for herself such as for clothing or jewelry, and was modest in her own personal expenditures."

Respondent's "lifestyle does not appear to have change[d] significantly since the date of separation." His average monthly expenses are approximately $5,100. The total value of his assets is approximately $1,700,000. Respondent "would have the financial ability to contribute to the support of [appellant]. . . ."

Since separation, appellant has resided in the former family residence, which was awarded to her pursuant to a property settlement. The market value of the residence is approximately $450,000. Appellant makes a monthly first mortgage payment of $656 and a monthly second mortgage payment of approximately $1,200. The balance due on the second mortgage is approximately $247,000. The second mortgage loan was used to purchase property in Malibu that was later sold. The net proceeds from the sale were approximately $475,000. Appellant intends to use a portion of the net proceeds to pay credit card debt of approximately $50,000, the balance due on the second mortgage, and capital gain tax of approximately $18,000.

In 2000 appellant sold separate property that she had inherited. The net proceeds from this sale were approximately $200,000. Because of poor investments, "the remaining value of said monies has been reduced to approximately $53,000."

Appellant claims that her monthly living expenses are $15,600. But the use of the Malibu property sale proceeds to pay her debts will reduce her monthly expenses by approximately $2,300.[4] Moreover, appellant's income and expense declaration includes expenses that she has incurred in supporting her adult children, including $1,600 per month as educational expenses. In addition, appellant "testified that she continues to pay for auto insurance, health insurance and clothing for the adult children."[5] "These expenditures that she has incurred have been done by her choice to support her adult children." However, respondent's "obligation of support for the parties' children legally ended upon their emancipation."

Appellant specifies a monthly expense of $1,774 for unreimbursed medical and dental expenses, but "a significant portion of these expenses . . . are for non-traditional

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[4] The reduction in monthly expenses appears to be substantially greater than $2,300. According to the Income and Expense Declaration filed June 27, 2003, each month appellant was paying $1,200 on the second mortgage, $1,040 on credit card debts of $50,000, and $2,000 on federal taxes owed for 2002. Appellant testified that she had "used a little more" than $50,000 of the Malibu property sale proceeds to pay her credit card debts. She intended to also use the proceeds to pay the second mortgage and the remaining taxes owed for 2002. These payments would reduce her monthly expenses by $4,240, not $2,300 ($1,200 + $1,040 + $2,000 = $4,240.)

[5] The Income and Expense Declaration filed June 27, 2003, specifies a monthly expense of $500 for clothing, which "[i]ncludes [sic] clothing for daughters."

health treatments such as meditation and visualization programs, which involved out of state travel to receive this care. This is where [appellant] learned to enter into an altered state of mind to have 'out of body experiences' in an effort to deal with the pain and discomforts from her illnesses." "A review of the other monthly expenses listed by [appellant], such as $500.00 per month for homeowner's insurance, almost $600.00 per month in monthly maintenance costs, $650 in utilities and $300 in telephone charges appear to be higher than the norm."

Appellant "testified that the value of her estate has been reduced to that of her residence, IRA accounts of [approximately] $100,000.00, an investment account with Fidelity of $53,000, an investment account with Morgan Stanley of $34,000 and the remaining $450,000.00 from the sale of the Malibu property, of which she will only have approximately $175,000 after payment of 2nd mortgage and other debts."[6]

"In reviewing the standard of living of the parties at or near the time of separation, it appears that [appellant] would be able to maintain a lifestyle similar to that which she enjoyed at the time of the parties[']' separation. If the [appellant] did not continue to incur the expenses she has in the past for the adult children, it would appear that her monthly expenses would be dramatically reduced, and

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[6] Earlier in its statement of decision, the trial court had found the net proceeds from the sale of the Malibu property to be approximately $475,000, not $450,000. The court had stated that appellant intended to use the proceeds to pay credit card debt of $50,000, the balance due ($247,000) on the second mortgage, and a capital gain tax of $18,000. Based on these figures, the remaining sale proceeds would be $160,000, not $175,000. We do not consider this apparent mathematical error to have materially affected the trial court's decision.

with her present income she would still be able to provide for all of her needs, including out of pocket medical expenses[,] money for travel, charity and also continued savings. Excluding the expenses claimed by [appellant] for the adult children's education, the share of the expenses she continues to pay for them, the credit card debt and tax liability in she [sic] which [sic] has liquid assets to satisfy, a review of the [appellant's] income and expense declaration indicates that the monthly expenses would appear to be less than one-half of the $15,000.00 per month listed on her income and expense declaration. This would also allow for approximately $700.00 per month for unreimbursed medical/dental costs,[7] $800.00 per month for travel and $1,250.00 per month of miscellaneous expenses."

Appellant's "present monthly income, from her social security and disability payments, amount to approximately $6770 per month which is virtually all non-taxable. This does not take into consideration any interest/dividend income that she can earn from her present assets, excluding her residence. . . . [¶] The parties' lifestyle was an upper middle-income lifestyle, and with the income available to [appellant], it does appear that she will for the present continue to be able to sustain a similar lifestyle based on her present income."

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[7] In her Income and Expense Declaration filed June 27, 2003, appellant claimed monthly unreimbursed medical and dental expenses of $1,774. If one subtracted $791.67 per month for alternative medical therapy ($9,500 annually) and $270.47 per month for T'Anne's health insurance (see discussion on these items at pages 6-7, *supra*), unreimbursed monthly medical and dental expenses would be reduced to $711.86.

Thus, the trial court found that appellant "at the present is able to be self-supporting and [respondent's] spousal support obligation is to be reduced to zero, as of October 1, 2003." But because the marriage was of long duration and appellant's health is deteriorating, the court reserved jurisdiction over the issue of spousal support.

Appellant contends that "the Court's conclusion that she had enough to meet her needs was not correct . . . because [her] uncontradicted monthly expenses were $8,856.32 more than her income." But "[t]he trial court was not required to accept appellant's claimed expenses, as trial courts must 'remain ever vigilant to exaggeration and falsification.' [Citation.]." (*In re Marriage of Weinstein* (1991) 4 Cal.App.4th 555, 569.)

We conclude that the trial court considered and weighed all relevant factors set forth in section 4320. Appellant has not shown that its weighing or application of these factors was arbitrary or capricious. The trial court, therefore, did not abuse its discretion in denying her permanent spousal support.

Reimbursement of College Expenses

Appellant contends that the trial court erroneously denied her claim for reimbursement for the college expenses she had paid on behalf of her daughters. Appellant asserted that the total college expenses were $261,206.31. The college fund established by the parties during their marriage had a balance of $73,936.06 as of July 1, 1994. Appellant claimed that she was entitled to reimbursement for the difference – $187,270.25 – between the total college expenses and the college fund balance. Her claim for reimbursement was based on a prior court order requiring

respondent to "pay as and for additional spousal support, the full college expenses of the minor or the adult daughters of the parties."[8] The court had defined "college expenses" as "tuition, room and board, and transportation to and from [college]."

Respondent declared that, in addition to the college fund, he had paid $73,639.48 toward his daughters' college expenses: $67,439.48 plus "$6,200 in 'transportation to and from' expenses – a car for Sarah." Father stated: "Between the College Fund ($73,936.06) and my subsequent payments ($73,639.48), a total of $147,575.54 has been applied to the college expenses. . . ." He contended that the total was more than adequate to cover these expenses.

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[8] "However, the court may not award support for an adult child under the guise of spousal support. [Citation.]" (*In re Marriage of Lynn* (2002) 101 Cal.App.4th 120, 133; see also *In re Marriage of Serna* (2000) 85 Cal.App.4th 482.) Here the prior spousal support order was apparently based on *In re Marriage of Siegel* (1972) 26 Cal.App.3d 88 and *In re Marriage of Paul* (1985) 173 Cal.App.3d 913. These two cases "had previously circumvented the no-support-for-an-adult-child rule by allowing, as one consideration in a spousal support order, the fact that the supported spouse was supporting an able-bodied adult child." (*In re Marriage of Serna, supra,* 85 Cal.App.4th at p. 484.) "The central flaw in both *Siegel* and *Paul* is that they allow for the naked circumvention of a decision that has already been made by the Legislature – namely, that child support ends at age 19 at the latest, absent incapacity to earn a living. Neither case ever quite confronted the idea that it was allowing something to be done indirectly [which] could not be done directly." (***Id.***, at p. 491.)

The trial court did not consider whether the "college expenses" portion of the prior spousal support order was unenforceable because it had awarded support for an adult child under the guise of spousal support. Instead, the trial court determined "that it must take a strict reading of the 'college expense' provision, as college expenses would have been in essence a continuing obligation for children after their legal emancipation."

On July 18, 2003, a trial was conducted on the reimbursement issue. Following the trial, the court took the matter under submission.

In its amended statement of decision, the trial court denied appellant's "claim for reimbursement of the expenses she paid and incurred in excess of the college fund." It concluded that "the bulk of the expenditures that she made were [*sic*] not within the definition of 'college expenses' as defined" in the earlier court order. (***Ibid.***) These expenditures included allowances for the children, "purchases of vehicles, vehicle repairs, car registration and auto insurance," and "monies [appellant] expended for Alexis while Alexis was in Costa Rica taking a course in Spanish."

The court found that the college fund "was under the sole control and management of [appellant]." It further found that respondent had "paid $67,439.48 in addition to the monies that were in the college fund toward the college expenses of the children." Although the court found that respondent had paid $6,200 to purchase a car for Sarah, it did not consider this payment to be a college expense. The court determined that the $67,439.48 together with the college fund balance of $73,936.06 – a total of $141,375.54 – was "more than sufficient to cover . . . tuition expenses, reasonable costs of room and board and the transportation cost to and from college" for Alexis and Sarah. The court found that total tuition payments were $7,892.56 for Alexis and $19,114.37 for Sarah.

As to T'Anne, the trial court found that the total tuition claimed by appellant was $12,072.00. Of this amount, approximately $10,600 was expended so that T'Anne could attend the American Academy of Dramatic

Arts for one semester. The court concluded that the tuition for this private institution was "unreasonable and not the type of tuition obligation intended to be imposed upon [respondent] by the Court." "In addition, at the time that [T'Anne] attended the academy, [she] had not attended college for several years . . . as she graduated from high school in 1993 and did not enroll in the American Academy until August of 1998." The court also found that the room and board expenses claimed by appellant for T'Anne did not qualify as "reimbursable 'college expenses.'"

The court concluded that respondent "has fully met [his college expense] obligation by virtue of the monies in the [college fund] and the additional contributions to the adult children's education that he paid under the prior [spousal support] Court order." The trial court's decision includes both discretionary rulings and factual determinations. The discretionary rulings are reviewed for abuse of discretion. The factual determinations are reviewed for substantial evidence. "Where findings of fact are challenged on a civil appeal, we are bound by the 'elementary, but often overlooked principle of law, that . . . the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court." (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660.)

We are hampered in our review of the trial court's decision because appellant has not provided us with a reporter's transcript of the trial conducted on July 18,

2003. The trial court set the matter "for a four-hour evidentiary trial" on that date. Both parties apparently testified at the trial, and the trial court heard oral argument. The original statement of decision began as follows: "The Court having reviewed the declarations submitted, including the accountings provided, and *having considered the testimony of the parties* and the argument of counsel, does now find and rule as follows." (Italics added.)

"'[I]f the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed.' [Citations.]" (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.) "Appealed judgments and orders are presumed correct, and error must be affirmatively shown. [Citation.] Consequently, [appellant] has the burden of providing an adequate record. [Citation.] Failure to provide an adequate record on an issue requires that the issue be resolved against [appellant]. [Citation.]" (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502; see also *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296; *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574; *Vo v. Los Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 448 ["The absence of a record concerning what actually occurred at the trial precludes a determination that the trial court abused its discretion."]; *In re Estate of Fain* (1999) 75 Cal.App.4th 973, 992 ["an appellant who attacks a judgment but supplies no reporter's transcript will be precluded from raising an argument as to the sufficiency of the evidence"]; *County of Los Angeles v. Surety Ins. Co.* (1984) 152 Cal.App.3d 16, 23 ["When, as here, the record on appeal consists of only a clerk's transcript and exhibits and no error appears on the face of the record, the sufficiency of the evidence to support the trial court's rulings is

not open to consideration by a reviewing court; in such a case, 'any condition of facts consistent with the validity of the judgment will be presumed to have existed rather than one which would defeat it [citation].' [Citations.]"].)

In her opening brief, appellant states that "[t]here was no court reporter present at the [trial]." But appellant does not support her statement by a citation to the record. Our search of both the record and the superior court file has not disclosed whether a court reporter was present.[9] We have not found any minutes for the trial date. Even if a court reporter were not present, appellant could have filled the gap by a settled or agreed statement. (See Cal. Rules of Court, rules 6 & 7.) Since appellant has failed to provide a reporter's transcript, settled statement, or agreed statement, the college expense issue must be resolved against her. "We must assume that all the ultimate facts set forth in the trial court's statement of decision were fully supported by the evidence presented." (*McKay v. Longsworth* (1989) 211 Cal.App.3d 1592, 1594.)

In any event, respondent's declarations constitute substantial evidence in support of the trial court's factual determinations and also show that the trial court did not abuse its discretion. Based on respondent's declarations and supporting documentation from the universities attended by Alexis and Sarah, their reasonable college expenses for a four-year degree should not have exceeded approximately $100,000. This amount is considerably less than the funds ($141,375.54) available to satisfy the college expenses.

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[9] Pursuant to Evidence Code sections 452, subdivision (d), and 459, we take judicial notice of the superior court file, case no. D229385.

Documentation from San Diego State University, attended by Alexis, showed that costs of attendance for the 1995-1996 academic year ranged from $10,826 for students living on campus to $11,676 for students living off campus. The costs of attendance included fees, books and supplies, food and housing, transportation, and "Miscellaneous/Personal" expenses."

Documentation from the University of California, Irvine, attended by Sarah, showed that estimated expenses, including fees, for the 1996-1997 academic year were $12,755 for students living on campus and $13,045 for students living off campus.

As to T'Anne, it was reasonable for the trial court to conclude that the remaining available funds were sufficient to satisfy respondent's obligation to pay her reasonable college expenses. Moreover, the trial court did not abuse its discretion in concluding that expenses incurred by T'Anne in attending the American Academy of Dramatic Arts for one semester were not "college expenses" within the meaning of the court's prior spousal support order.

Notice

The trial court modified the prior spousal support order requiring respondent to pay his daughters' college expenses. The court determined "that no additional spousal support in the form of educational expenses for the adult children is to be ordered." Appellant contends that respondent's notice of motion to modify spousal support, filed on February 15, 2002, failed to give her notice that it encompassed the modification of respondent's obligation to pay his daughters' college expenses. In the notice of

motion, respondent requested that the trial court modify the order of April 13, 1999, requiring him "to pay to [appellant] as spousal support $1,379.00." Although the order of April 13, 1999, also required respondent to pay his daughters' college expenses as additional spousal support, the notice of motion did not expressly mention these expenses.

The trial court found that the notice of motion "implicitly include[d] the adult educational expenses." We agree with the trial court. In the notice of motion, respondent requested that the amount of spousal support be reduced to a "jurisdictional/nominal" level. Since the payment of college expenses was ordered as additional spousal support, this request put appellant on notice that the entire matter of spousal support, including the payment of college expenses, was at issue.

Change in Circumstances

Appellant contends that the trial court erred in modifying spousal support without a showing of a material change in circumstances. "Modification of a spousal support order may be made only on a showing of a material change in circumstances after the last order. [Citations.] . . . The moving party has the burden of showing a material change of circumstances since the last order was made. [Citation.]" (*In re Marriage of Tydlaska* (2003) 114 Cal.App.4th 572, 575.) "Appellate review of orders modifying spousal support is governed by an abuse of discretion standard, and such an abuse occurs when a court modifies a support order without substantial evidence of a material change of circumstances. [Citations.]" (*In re Marriage of McCann* (1996) 41 Cal.App.4th 978, 982-983.)

The change of circumstances requirement applies only to modifications of permanent spousal support. It does not apply to modifications of temporary spousal support. (*Sande v. Sande* (1969) 276 Cal.App.2d 324, 329; *Zinke v. Zinke* (1963) 212 CA.2d 379, 382; *Rosenthal v. Rosenthal* (1961) 197 Cal.App.2d 289, 309.)[10] In any event, appellant has failed to show that the reduction in temporary spousal support was unwarranted by a material change of circumstances. "[T]he appellant has the burden to affirmatively show, based on the record, the trial court's commission of reversible error. [Citations.]" (*GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 872.) Indeed, the division of the community property assets pursuant to the July 2001 judgment on reserved issues would appear to constitute a change in circumstances sufficient to warrant a review of temporary spousal support. (See *In re Marriage of Varner* (1997) 55 Cal.App.4th 128, 146.)

No material change of circumstances was required when the court made its order denying appellant permanent spousal support. The order concerning permanent spousal support was a new, independent order based on statutory guidelines. (§ 4023.) It did not modify any prior order of temporary spousal support. "The determination of permanent spousal support at trial must be de novo. Only at trial is all the evidence presented. The permanent order

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[10] But see *In re Marriage of Murray* (2002) 101 Cal.App.4th 581, 597, fn. 11, where the court observed in dicta that "[i]t would seem to follow from the finality of a temporary support order that a subsequent modification should require a showing of 'changed circumstances,' as in the case of a permanent support order." However, the *Murray* court noted "that there are several cases that hold no such showing is necessary." (***Ibid.***) The *Murray* court stated that it would "not attempt to resolve this issue. . . ." (***Ibid.***)

is to be based upon circumstances existing at trial, and a change of circumstances from the time of the pendente lite order is irrelevant to a determination of the amount of support which is 'just and reasonable' at that time." (*In re Marriage of McNaughton* (1983) 145 Cal.App.3d 845, 849.)

Attorney's Fees

Appellant contends that the trial court abused its discretion in refusing to award her attorney's fees. In its amended statement of decision, the trial court noted that appellant "indicates that she has or will have incurred attorney's fees and costs in excess of $120,000."

Appellant sought attorney's fees as sanctions under section 271. Section 271 provides in relevant part: "(a) Notwithstanding any other provision of this code, the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction."

In its amended statement of decision, the trial court declared: "The Court finds that [appellant] has failed to establish by a preponderance of the evidence that the actions of [respondent] have been to frustrate settlement or to increase the amount of litigation costs in this matter." The trial court, therefore, refused to award attorney's fees as sanctions under section 271.

"'"[T]he trial court's order will be overturned only if, considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order. . . ." [Citations.]' [Citation.]" (*In re Marriage of Burgard* (1999) 72 Cal.App.4th 74, 82.) Appellant has failed to demonstrate that no judge could have reasonably concluded that sanctions under section 271 were unwarranted.

Appellant also sought attorney's fees under sections 2030 and 2031. Section 2030, subdivision (a)(2), provides in relevant part: "Whether one party shall be ordered to pay attorney's fees and costs for another party, and what amount shall be paid, shall be determined based upon, (A) the respective incomes and needs of the parties, and (B) any factors affecting the parties' respective abilities to pay." Section 2032, subdivisions (a) and (b), provide: "(a) The court may make an award of attorney's fees and costs under Section 2030 or 2031 where the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties. [¶] (b) In determining what is just and reasonable under the relative circumstances, the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in Section 4320. The fact that the party requesting an award of attorney's fees and costs has resources from which the party could pay the party's own attorney's fees and costs is not itself a bar to an order that the other party pay part or all of the fees and costs requested. Financial resources are only one factor for the court to consider in determining how to apportion the

overall cost of the litigation equitably between the parties under their relative circumstances."

The trial court determined that, "[b]ased on the present income of the parties a total contribution of fees in the sum of $25,000, payable by [respondent] to [appellant] would appear to be appropriate, as [respondent] does have the present financial ability to make a contribution of fees to [appellant]." However, in view of appellant's bad faith conduct in filing a related action against respondent, the trial court refused to award her attorney's fees.

Acting in pro se, appellant filed the related action in May 1999 in the United States District Court for the Central District of California. The action named respondent, his new wife, and his counsel as defendants. The complaint claimed that defendants had violated the federal Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. § 1961 et seq.). The complaint alleged that defendants had misrepresented respondent's "financial affairs through a pattern of racketeering activity, and conspired to wrongfully divert, hide, distort and misrepresent [respondent's] assets, through fraud on [appellant], . . . in order to wrongfully minimize the total marital estate, . . . as well as the amount of support awarded to [appellant] by the family law court. . . ."

On June 23, 1999, appellant wrote a letter to respondent's counsel concerning the RICO action. In the letter, appellant noted that, if she pursued the RICO action, there was "a risk of the federal court's referring the matter for criminal prosecution." Appellant also noted that, by bringing the action, she had a created a conflict of interest between respondent and his counsel. Appellant stated that she would "vigorously" pursue the RICO action unless

respondent satisfied her demands. One of her demands was that "[s]ettlement of the dissolution action must be completed in writing not later than July 31, 1999."

Appellant agreed to dismiss the RICO action pursuant to the MSA incorporated in the judgment on reserved issues entered on July 12, 2001. The agreement provides that the dismissal "shall never constitute an admission . . . that said action was without merit, was brought for any improper motive, was brought in bad faith, or was brought to vex and/or harass Defendants in any manner whatever."

In defending against the RICO action, respondent incurred attorney's fees of approximately $30,000. Since appellant was acting in pro se, she did not incur any attorney's fees.

The trial court found "that the RICO action was brought by the [appellant] in bad faith . . . in an effort to gain a leverage and affect the outcome of this dissolution of marriage proceedings." It also found the action "to be in violation[ ] of the policy of the law as expressed in *Family Code Section 271.*" The trial court therefore determined that it would be appropriate to award respondent, as a sanction against appellant, the attorney's fees he had incurred in defending against the related RICO action, provided that "[appellant] has the ability or is reasonably likely to have the ability to pay [said] attorney's fees."[11]

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[11] The trial court relied on *In re Marriage of Green* (1992) 6 Cal.App.4th 584, 588, where the appellate court held "that an award of attorney fees and costs, either as a sanction or for actions 'related' to a marital dissolution action, was supported by findings that a party to the action brought other actions or proceedings against his spouse or her attorney to gain an unfair advantage over the spouse, to deliber-

(Continued on following page)

The trial court found that, although appellant had sufficient income and assets to pay her own counsel, she "does not appear to have income or assets available to contribute to the fees incurred by [respondent]." The trial court, therefore, did not award attorney's fees to respondent as a sanction against appellant under section 271.[12]

On the other hand, the court concluded that, "in light of the conduct of the [appellant concerning the RICO action] and the additional fees that [her] conduct caused the [respondent] to incur it would be inequitable to reward [appellant] for said conduct by ordering [respondent] to contribute any additional fees, except for those previously ordered by the Court. . . ." The court noted that in November 1996 respondent had been ordered to make a contribution of $10,000 toward appellant's attorney's fees.

The trial court made a factual finding when it found "that the RICO action was brought by the [appellant] in bad faith . . . in an effort to gain a leverage and affect the outcome of this dissolution of marriage proceedings." This finding is supported by substantial evidence in the form of the June 24, 1999, letter from appellant to respondent's counsel.

We must determine whether, based on this finding, the trial court abused its discretion in refusing to award attorney's fees to appellant. We must "affirm the court's order unless '"no judge could reasonably make the order made. [Citations.]"' [Citations.]" (*In re Marriage of Duncan*

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ately attempt to exhaust his spouse financially and deny her effective counsel, and to dissuade her counsel from pursuing the action."

[12] Appellant erroneously contends that the trial court awarded attorney's fees to respondent as a sanction.

(2001) 90 Cal.App.4th 617, 630.) Here a judge could have reasonably concluded that, in view of appellant's bad faith filing of the related RICO action and the $30,000 in attorney's fees incurred by respondent in defending against that action, it would have been inequitable to require respondent to make a further contribution toward appellant's attorney's fees.

Disposition

The judgment is affirmed. Respondent shall recover his costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Manuel J. Covarrubias, Judge

Superior Court County of Ventura

Melodie Kleiman, in pro per, Appellant.

Schroeder, Comis, Nelson & Kahn and Mark A Nelson. Norman, Dowler, Sawyer, Israel, Walker & Barton and Matthew P. Guasco, for Respondent.

MARK A. NELSON, State Bar No. 101157
SCHRÖEDER COMIS NELSON & KAHN LLP
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Attorneys for Petitioner Theodore M. Kleiman

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF VENTURA

In Re Marriage of:	Case No. D 229385
Petitioner: THEODORE M. KLEIMAN	FURTHER JUDGMENT ON RESERVED ISSUES
and	(Filed Jul. 22, 2005)
Respondent: MELODIE W. KLEIMAN	

RECITALS

A. On September 14, 1995, a Judgment of Dissolution of Marriage – Status Only was entered in the above-captioned action.

B. On July 21, 2001, a Judgment of Dissolution of Marriage – Judgment on Reserved Issues was entered in the above-captioned action. Attached to the Judgment on Reserved Issues was a Marital Settlement Agreement which provided, at page 25, paragraph 17, that the Marital Settlement Agreement was merged into the Judgment on Reserved Issues, and further defined issues were reserved for later determination, as follows:

> "(1) spousal support (including, but not limited to, amount, duration, the issues of retroactivity, arrearages, and/or overpayment), (2) the payment of expenses related to the college education of the parties' adult children, (including, but not limited to, retroactivity and arrearages), (3) the allocation and payment of the capital gains tax(es), if any, with respect to the Oceanaire lot referred to hereinabove, (4) reimbursement of advanced appraisal fees, and (5) either party's request for attorneys' fees and costs (including but not limited to Husband's and/or Wife's, attorneys' fees related to the 'RICO' action referred to hereinabove)." (Judgment on Reserved Issues, page 29, paragraph 22.)

C. The instant document constitutes the Further Judgment on the aforementioned further reserved issues.

D. As to the Judgment on Reserved Issues and this Further Judgment on Reserved Issues, petitioner Theodore W. Kleiman (hereinafter "Petitioner") was represented by Mark A. Nelson, Esq., and respondent Melodie M. Kleiman (hereinafter "Respondent") was represented by Michael J. Silver, Esq.

E. The reserved issues were bifurcated for the purposes of Trial and were each addressed as indicated on the following summary of dates:

Date	Trial/Ruling
May 2, 2003	Trial on spousal support retroactivity, arrearages, and/or overpayment. Tentative Ruling from Bench on May 2, 2003.
July 18, 2003	Order After Hearing [Spousal Support Retroactivity] entered by Court.

July 18, 2003	Trial on the payment of expenses related to the college education of the parties' adult children (including, but not limited to), retroactivity and arrearages.
August 4, 2003	Statement of Decision re Reimbursement of College Expenses.
August 19, 2003	Respondent's filing of Objections to Statement of Decision and Notice of Intention to Move for New Trial (subsequently opposed by Petitioner).
September 18 and 19, 2003	Trial on permanent spousal support; modification of temporary spousal support.
November 17, 2003	Tentative Decision [Spousal Support].
February 20, 2004	Respondent's Objections to Proposed Statement of Decision (Spousal Support), and Notice of Intention to Move for a New Trial (subsequently opposed by Petitioner).
April 30, 2004	Trial on all attorneys' fees and costs, appraisal fees at overpayment of spousal support.
July 2, 2004	Filing of Statement of Decision [Attorneys' fees, costs and overpayment].
July 21, 2004	Respondent's Objections to Proposed Statement of Decision [re attorneys' fees], and Notice of Intention to Move for a New Trial (subsequently opposed by Petitioner).

December 16, 2004	Hearing on all of Respondent's Objections to Statements of Decision and Motions for New Trial(s).
March 14, 2005	Filing of Amended Statement of Decision and Ruling on All Motions for New Trial.

Respondent withdrew her claims regarding the allocation and payment of the capital gains tax(es), if any, with respect to the Oceanaire lot.

F. The bases for the Court's various Rulings are more particularly set forth in the Amended Statement of Decision filed March 14, 2005. The Motions for New Trial were all denied.

FURTHER JUDGMENT

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED as follows:

Modification of Temporary Spousal Support

1. Petitioner's claim for credit and/or reimbursement for payments he made for the support of Respondent for the period of August 1994 through June 1995 is denied. The Court finds and orders the payments made during this period were voluntary payments of support.

2. The Court finds and orders that it is without jurisdiction to order modification of spousal support for the period from July 1, 1995 through February 15, 2002.

3. Petitioner's Motion to Modify Temporary Spousal Support, filed February 2, 2002, is granted. The Court finds that it would be appropriate to set temporary spousal support based on the guidelines that this Court has

adopted for the purposes of determining temporary support. The Court adopts the attached computer printout marked as Exhibit A as its basis for determining temporary spousal support. The prior temporary spousal support order in the amount of $1,379.00 per month, ruled upon on November 22, 1996 and subsequently memorialized as a formal Order, is modified to a reduced monthly amount. Petitioner shall pay to Respondent, as and for temporary spousal support, the sum of $379.00 per month, effective as of March 1, 2002, and continuing thereafter until October 1, 2003 (at which time spousal support shall be as per the permanent support order provided below).

4. The Court further modifies the prior temporary spousal support order, which provided for additional support in the form of educational expenses for the parties' adult children. The Court finds that said education expenses previously ordered were in the form of additional spousal support. The Court grants the Petitioner's request to modify said provision that no additional spousal support in the form of educational expenses for the adult children is to be ordered.

College Education Expense Reimbursement Claim

5. The Court finds and orders that the Petitioner has met and fully satisfied his obligation to pay for the "college expense" as ordered under the Court's ruling of November 22, 1996, and that the Respondent is not entitled to any reimbursement for the expenses she has paid for the children's college education.

Permanent Spousal Support

6. The Court finds and orders that the parties' lifestyle was an upper middle-income lifestyle and with the income presently available to Respondent, Respondent will, for the present, continue to be able to sustain a similar lifestyle and is able to be self-supporting. Accordingly, Petitioner's spousal support obligation is to be reduced to zero, as of October 1, 2003. As this is a long-term marriage, and due to the deteriorating health of the Respondent the Court reserves jurisdiction over the issue of spousal support for the Respondent.

Attorney Fees and Costs

(a) Art Appraisal Costs of $705.00

7. The Court finds and orders that the Petitioner owes to the Respondent the sum of $705.00 for art appraisal costs.

(b) Attorney's Fees

8. Each party is seeking a contribution from the other toward the attorney's fees and costs that he and she have incurred in this action. Neither party is awarded attorney's fees based on the findings and orders set forth below.

9. The Petitioner is seeking a contribution of attorney's fees from the Respondent and in particular is seeking reimbursement for the attorney's fees he incurred in defending the RICO complaint filed by the Respondent. Petitioner seeks fees under *Family Code Sections 2030(a), 270 and 271,* maintaining that the RICO proceedings are a related matter to this action. The Court finds and orders

that the RICO action was brought by the Respondent in bad faith and was brought in an effort to gain a leverage and affect the outcome of this dissolution of marriage proceeding. Said filing is also found to be in violation of the policy of law as expressed in *Family Code §271.* The Court finds pursuant to *Family Code Section 2030(a)* and pursuant to *In Re Marriage of Green,* 6 Cal. 4th 584, that the RICO action was a related action to this dissolution of marriage proceeding.

10. The Court therefore finds that attorney's fees would be appropriate, if the Respondent has the ability or is reasonably likely to have the ability to pay attorney's fees. Based on the present financial position of the Respondent, it does not appear that she has the ability nor is reasonably likely to have the ability to pay attorney's fees to the Petitioner. Though the Respondent received community assets (in addition to her separate property assets) with a value of approximately $1,600,000, the Respondent's estate has dwindled dramatically. As previously found by the Court, the reduction in her estate appears to be not only due to investments that did not prove to be as profitable as anticipated, but also due to the monetary expenditures the Respondent has made for the support of the adult children of the parties. The Respondent has also incurred a significant amount of attorney's fees and owes a significant balance on the attorney's fees she has incurred. It is unclear to the Court, in light of the amount of expenditures that the Respondent has made in the past, why she was not able to make payments to reduce the outstanding balance owed to her counsel. Based on Respondent's present income and assets she would have monthly income available to her to make monthly payments to pay the fees that she has incurred with her own counsel but,

does not appear to have income or assets available to contribute to the fees incurred by the Petitioner.

11. The Respondent is also seeking a contribution of attorney's fees from the Petitioner. The Respondent maintains that the Petitioner's conduct in these proceedings have been in violation of policies set out in *Family Code Section 271*. The Court finds and orders that the Respondent has failed to establish by a preponderance of the evidence that the actions of the Petitioner have been to frustrate settlement or to increase the amount of litigation and costs in this matter.

12. The Respondent is also seeking a contribution of attorney's fees pursuant to *Family Code Sections 2030 and 2031*. The Respondent maintains that there is a substantial disparity in the present income of the parties and also as to the current value of their respective estates. The Petitioner's financial picture is certainly stronger than that of the Respondent. The Petitioner appears to have been much more prudent in his investments, managing of his assets that he received from the division of the community estate, and/or limiting his expenditures. The Petitioner also has incurred a significant amount of attorney's fees and he has been able to meet said fees incurred on an ongoing basis. Based on the present income of the parties, a total contribution of fees in the sum of $25,000.00, payable by the Petitioner to the Respondent, would appear to be appropriate, as the Petitioner does have the present financial ability to make a contribution of fees to the Respondent. The Petitioner was previously ordered to make a contribution of fees of $10,000,00. At the time said order was made in November of 1996, it was without prejudice to being reallocated on a portion of the Respondent's share of the community property. The

$10,000.00 previously paid by Petitioner pursuant to said Order, are now deemed a contribution of attorney's fees by Petitioner to Respondent. However in light of the conduct of the Respondent and the additional fees that the Respondent's conduct caused the Petitioner to incur, it would be inequitable to reward the Respondent for said conduct by ordering Petitioner to contribute any additional fees, except for those previously ordered by the Court, and the $705 for reimbursement on the art appraisal.

Dated: JUN 30 2005

MANUEL J. COVARRUBIAS
MANUEL J. COVARRUBIAS
JUDGE OF THE
SUPERIOR COURT

APPROVED AS TO FORM:

/s/ Mark Nelson
MARK A. NELSON, Esq.,
Attorney for Petitioner
Theodore M. Kleiman

/s/ Michael J. Silver
MICHAEL J. SILVER, Esq.,
Attorney for Respondent
Melodie W. Kleiman

EXHIBIT "A"

DissoMaster Data Screen
Monthly Figures

Input Data	Husband	Wife
Party Info	Husband	Wife
Number of children	0	0
% time with NCP	0.00	0.0
Filing Status	<-MFJ	HH/MLA
# federal exemptions	3	2
Wages + salary	11648	0
Self-employment income	0	0
Other taxable income	722	1299
TANF plus CS received	0	0
Other nontaxable income	0	5180
New-spouse income	11264	0
Adj. Income (ATI)	1263	0
SS paid other marriage	0	0
CS paid other relationship	0	0
Health insurance	263	249
Itemized deductions	1073	5788
Other medical expenses	0	695
Property tax expenses	515	575
Ded. interest expense	206	3340
Contribution deduction	352	1178
Miscellaneous Itemized	0	0
Required union dues	0	0
Mandatory retirement	0	0
Hardship deduction	0*	625*
Other guideline deductions	0	0
AMT Info (IRS Form 6251)	0	0
Child support add-ons	0	0

Guideline (2002)	
Nets (adjusted)	
Father	7945
Mother	5605
Total	13550
Support	
Presumed CS	
Basic CS	
Add-ons	
S. Clara SS	379
Total	379
CS Range:	
Proposed, Tactic 9	
Presumed CS	0
Spousal Support	379
Total	379
Comb. Savings	0
Releases (opt)	0
Default Case Settings	
1 Tax Settings Changed	

Cash Flow Analysis	Gdln.	Prop.
Comb. net spendable	13550	13550
Percent change	0%	0.0%
Husband, payor of SS, Prop. SS.		
Payment Cost	292	292
Net spendable income	7566	7566
Change from guideline	0	0
% of combined spendable	55.8%	55.8%
% of saving over guideline	0%	0.0%
Total Taxes	4162	4162
Dep. exemptions value	0	0
# withholding allowances	0(es)	0(es)
Net wage paycheck	7714	7714
Wife		
Payment benefit	379	379
Net spendable income	5984	5984
Change from guideline	0	0
% of combined spendable	44.2%	44.2%
% of saving over guideline	0%	0.0%
Total Taxes	0	0
Dep. exemptions value	0	0
# withholding allowances	0	0
Net wage paycheck	0	0

DissoMaster Detailed Input Data
Monthly Figures

Husband/Wife Data

Input Data	Husband	Wife
Party Info	Husband	Wife
Blind	No	No
65 or older	No	No
New spouse is blind	No	No
New spouse is 65 or older	No	No
Lived w/ MFS spouse part of yr.	Yes	Yes
Number of children	0	0
% time with NCP	0.00	0.00
Filing Status	<-MFJ	HH/MLA
# federal exemptions	3	2
Self	1	1
New spouse	1	0
Other dependents	1	1
Auto-calculate total	No	No
Wages + salary	11648	0
Self-employment income	0	0
Other taxable income	722	1299
Short-term capital gains	0	0
Long-term capital gains	0	0
Line 4e from IRS form 4952	0	0
Unrecaptured Sec 1250 gain	0	0
Ordinary Dividends	105	0
Qualified Dividends	105	0
Interest received	308	0
Social Security received	0	1458
Unemployment compensation	0	0
Operating losses	(0)	(250)
Royalties	0	0
Rental income	252	0
Other	57	93
TANF plus CS received	0	0
Other nontaxable income	0	5180
Significant other, MFS income	0	0

Tax exempt interest	0	0
Depreciation or other	0	5180
New-spouse income (& expenses)	11264	0
Wages + salary	11264	0
Self-employment income	0	0
SS paid other marriage	0	0
Retirement contribution if ATI	0	0
Required union dues	0	0
Necessary job-related expenses	0	0
Adjustments to Income (ATI)	1263	0
SS paid other marriage	0	0
CS paid other relationship	0	0
Health insurance	263	249
Paid by party	263	249
Wage deduction	0	0
Itemized deductions	1073	5788
Other medical expenses	0	695
Property tax expenses	515	575
Deductible interest expense	206	3340
Contribution deduction	352	1178
Miscellaneous itemized	0	0
Required union dues	0	0
Mandatory retirement	0	0
Qualified adjustment to income	0	0
Nonqualifying contributions	0	0
Hardship deduction	0*	625*
Other Fam C 4071(b) kids	0.0	0.0
$$$ for Fam C 4071(b) kids	0	0
Calculated	0	0
Extraordinary health expenses	0	625
Uninsured catastrophic losses	0	0
Use calculated hardship	Yes	Yes
Other guideline deductions	0	0
Necessary job-related expenses	0	0
Other discretionary deductions	0	0
AMT Info (IRS Form 6251)	0	0
4 Certain Interest on home mortgage	0	0
7 Investment Interest	0	0

8 Post-1986 depreciation	0	0
9 Adjusted gain or loss	0	0
10 Incentive stock options	0	0
11 Passive activities	0	0
12 Estates and trusts. Sched K-1 (Form 1041, line 8)	0	0
13 Tax exempt interest from private activity bonds (post 8/7/1986)	0	0
14 Other preferences (see IRS Form 6251)	0	0
20 AMT operating loss deduction	(0)	(0)
Child support add-ons	0	0
Child care: kids this relationship	0	0
Visits, school & travel expenses	0	0
Uninsured health expenses	0	0
Child care for other kids	0	0

PROOF OF SERVICE
(By Mail)

STATE OF CALIFORNIA, COUNTY OF VENTURA

I am employed in the County of Ventura, State of California. I am over the age of 18 and not a party to the within action; my business address is: 300 Esplanade Drive, Suite 1170, Oxnard, California 93030.

On July 28, 2005, I served the foregoing document described as Notice of Entry of Further Judgment on Reserved Issues on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Michael J. Silver, Esq. Silver & Arsht 1860 Bridgegate Street Westlake Village, California 91361-1409	Attorney for Respondent

I am readily familiar with Schröeder Comis Nelson & Kahn, LLP's, practice for collection and processing correspondence for mailing with the United States Postal Service. Under this practice, the correspondence is deposited with the United States Postal Service that same day in the ordinary course of business, with postage thereon fully prepaid, at Oxnard, California. Following ordinary business practices, I placed said envelope for collection and mailing, on July 28, 2005, at Oxnard, California.

Executed on July 28, 2005, at Oxnard, California.

☒ (**State**) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

KIM WEBER
Type or Print Name

Signature

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF VENTURA

THEORDORE W. KLEIMAN, Petitioner, vs. MELODIE M. KLEIMAN, Respondent.	) Case No.: D229385)) AMENDED STATE-) MENT OF DECISION)) (Filed Mar. 14, 2005)))

Trial on the issues of (1) Reimbursement of College Expenses being sought by Respondent; (2) Modification of a Temporary Order of spousal support sought by Petitioner; (3) Spousal support at time of trial; (4) Petitioner's request for credit of alleged overpayment of spousal support during the period of August 1, 1994, through June 1998; and (5) the issue of attorney's fees being sought by the parties were previously heard by the Court. The Court issued rulings on said issues and issued a Statement of Decision and Tentative Statements of Decision. By agreement of counsel, all said Rulings were to be treated as tentative Statement of Decisions until the Court issued its final Ruling as to all matters.

The Court having received and reviewed the objections to the Court's Tentative Statement of Decision as to all matters and having heard and considered the Response to said objections and the Reply on behalf of Respondent, does now issue the following Amended Statement of Decision. Counsel for Respondent is directed to prepare a formal judgment consistent with these findings, rulings and orders contained in this Amended Statement of Decision. Said Judgment is to be forwarded to counsel for

the Respondent for approval as to its content prior to being submitted to the Court for signature.

I.

REIMBURSEMENT OF COLLEGE EXPENSES

The parties and their respective counsel stipulated that the declarations of the parties as to the educational expenses incurred and the accountings provided were to be received into evidence subject to cross-examination.

1. It was undisputed that the parties established a college education fund for the parties' children. As of July 1, 1994, said college fund had a balance of $73,936.04. Further, said college fund was under the sole control and management of Respondent. In November 1996, it was estimated that the balance of said account was approx. $7,000 – $9,000. The appropriateness of the expenditures on said account was questioned by Petitioner through his counsel as early as November 1996.

2. Respondent is seeking reimbursement for college expenses she has paid after the education funds were depleted. The Respondent maintains that she has expended $187,270.25 in college expense for the children of the parties and is seeking reimbursement of said amount from Petitioner. (Respondent's argument re: children college expenses filed June 27, 2003, page 6, lines 19-21) Respondent's request for reimbursement is based on the ruling and order issued by Judge Robert Bradley. Said ruling was issued on November 22, 1996, wherein Judge Bradley ruled as follows:

> " . . . , I'm prepared to order, . . . , once the – I'll call the "college fund" – is depleted that Dr.

> Kleiman make the full college expenses of the minor or adult daughters and define college expenses as tuition, room and board – , or transportation to and from. The other things they can work out. They're adults. But I would leave it at that, and if they are not attending, there's no room, tuition or board. If the expense changes, then he'll just pay that expense. Of course Respondent would be required to furnish proof as to what that amount is." (Transcript of proceeding of November 22, 1996, page 10 lines, 17-27.)

The Respondent sought to vacate or have the orders issued on November 22, 1996, reconsidered by the Court. Said request was heard and denied by the Court on March 12, 1997. During the proceedings on said date, the issue of college expenses was raised and a discussion held. (Transcript of proceeding of March 12, 1997, pages 20 thru 23.) Judge Bradley reaffirmed his ruling as to what college expenses would be the obligation of the Petitioner. "Room, board and tuition, whatever the transcript says – ." (Page 20 lines 22-23). The Respondent inquired whether that included an allowance and Judge Bradley indicated it did not as it had been rejected. (Page 20 lines 24-26 and page 22 lines 16-22).

Petitioner opposes the reimbursement being sought by the Respondent as he has paid $67,439.48 in addition to the monies that were in the college fund toward the college expenses of the children. In addition, the Petitioner paid $6,200.00 to the Respondent, which was for a vehicle purchased for one of the children to be used for college. (Declaration of Theodore Kleiman, M.D. filed June 27, 2003, page 2 lines 26-27).

3. The Court denies the Respondent's claim for reimbursement of the expenses she paid and incurred in excess of the college fund. At the time the Order was made for the payment of college expense for the adult children, they were contemplated as part of a temporary spousal support order being issued by the Court. (Transcript of November 22, 1996, Page 7, Line 78). There had been no accounting for the expenditure of the college fund that had been created by the parties. At the hearing of March 12, 1997, the Court's record reflects a continuing issue as to the balance of monies in existence of said college fund account and as to the expenditures that had been made from said account by the Respondent. (Transcript of 3/12/1997, Pages 19-23).

4. The Court finds that although the expenses may have been in her estimation reasonably necessary for the children's college education that the bulk of the expenditures that she made were not within the definition of "college expenses" as defined by the Court in its order and ruling of November 22, 1996. The Respondent's accounting lists a category of an "allowance" for the children. The Court specifically indicated that an "allowance" was not a matter to be considered as "college expenses." The transportation expenses were limited by the Court for that of travel to and from (which the Court finds was meant to cover travel expenses to and from college from the residence of the parties); however, the Respondent is seeking reimbursement for items such as purchases of vehicles, vehicle repairs, car registration and auto insurance that would not fall within the definition of "college expenses" as defined by the Court. As indicated by the Court, other expenses would have to be worked out, which is what the parties apparently did when the Petitioner contributed to

the purchase of a vehicle. The other transportation costs claimed by the Respondent could not be readily identified as travel costs to and from college, but as indicated in her testimony, included travel to work and other places for the children.

The Respondent is also seeking reimbursement for the monies she expended for Alexis while Alexis was in Costa Rica taking a course in Spanish. Again it was clear from the Court's ruling that these type of expenditures were not intended to be included in the Court's definition of "college expenses" that the Petitioner would be obligated to pay. As stated by Judge Bradley, "You've got a couple of adult daughters here. Maybe they ought to think about or be responsible for some of the incidentals here. Again I don't want to re-emphasize what I already said, but I guess I am going to have to. Tuition, room and board. The rest of it, someone else, perhaps the children themselves are going to have to look to those types of payments. Certainly other students do. I don't see why they can't." (Transcript of proceeding of March 12, 1997 at page 23 lines 1-9).

The total tuition payments for the child Alexis were $7,892.56. The total tuition payments for the child Sarah were $19,114.37. The amounts that were in the college fund plus the amounts paid in addition by the Petitioner would have been more than sufficient to cover said tuition expenses, reasonable costs of room and board and the transportation cost to and from college.

The total tuition claimed by Respondent for Tierney, known as T'Anne was $12,072.00. The bulk of the tuition incurred for T'Anne, approximately $10,600.00, was expended for T'Anne to attend the American Academy of Dramatic Arts. (Respondent's accounting of college expenses

for T'Anne.) As testified to by the Respondent if T'Anne would have completed said program, she would have, obtained an associates of arts degree. However, she did not complete her studies as she only attendee for one semester. In addition, at the time that T'Anne attended the academy, T'Anne had not attended college for several years and as she graduated from high school in 1993 and did not enroll in the American Academy until August of 1998. Further, the cost of said tuition for the private institution which was in excess of $10,000.00, in comparison of the cost of tuition at the four-year college attended by the other two children, is found to be unreasonable and not the type of tuition obligation intended to be imposed upon the Petitioner by the Court. In addition, Respondent is seeking reimbursement for room and board expenses that she paid for T'Anne. However T'Anne was already living on her own in the Los Angeles at the time that she enrolled in the academy. Further, the room and board expenses claimed while T'Anne has been enrolled at the Ventura Community College are found not to be the room and board expenses contemplated in the Court's definition of reimbursable "college expenses."

The Court also finds that it must take a strict reading of the "college expense" provision, as college expenses would have been in essence a continuing support obligation for children after their legal emancipation. As stated in *Marriage of Serna* 85 CA4th 482, "The legislature occupies a better position than the judiciary to explain why a married couple who do not get divorced have no obligation to fund a college education for their adult children, but a divorced couple would have, in effect, a legal obligation to do so." at footnote 8.

5. The Court finds that the Petitioner has met and fully satisfied his obligation to pay for the "college expense" as ordered under the Court's ruling of November 22, 1996, and that the Respondent is not entitled to any reimbursement for the expenses she has paid for the children's college education.

6. The Respondent did not raise, at time of trial, a claim of reimbursement for these college expenses based on any third party beneficiary contract. Responden argues that she should be entitled to reimbursement based on this legal theory. The Court finds that the Respondent failed to provide sufficient evidence that a third party beneficiary contract was created by virtue of the Court's order. The college expenses ordered to be paid by Judge Bradley, were as part of the temporary spousal support owed to Respondent and not the adult children. Respondent was informed that the college expense to be considered would be limited and that the adult children might have to pay for some of their own expenses.

II.

MODIFICATION OF TEMPORARY SPOUSAL SUPPORT ORDER.

The Court grants the Petitioner's request for a modification of the temporary spousal support order. Temporary spousal support of $1,379.00 per month has been in effect as of October 1, 1996. The Court record is abundantly clear that at the time spousal support was determined in November of 1996, that it was an order for temporary spousal support. The transcript of the proceedings of November 22 1996, also clearly established that the educational expenses, as defined by the Court to be paid

by Petitioner, upon the depletion of the educational funds were being treated by the Court as part of the temporary spousal support order. The motion filed on February 2, 2003 by Petitioner sought to modify the temporary spousal support order issued in November 1996, as such the Court finds that the entire issue of spousal support was subject to modification, including the consideration of the college expenses for the adult children.

The Court finds that it would be appropriate to set temporary spousal support based on the guidelines that this Court has adopted for purposes of determining temporary support. The Court acknowledges that it made several errors in determining temporary spousal support in its prior Tentative Statement of Decision.

The evidence presented at the time of the hearing included the parties' federal and state income tax returns for the tax year of 2002. Based on said tax returns that were marked and received as Petitioner's exhibits nos. 1 & 2, the Court modifies spousal support to $379.00 per month effective as of March 1, 2002 and continuing on the 1st of each month thereafter until October 1, 2003, when spousal support shall be as per the permanent support order as provided below. The Court adopts the attached corrected computer printout marked as **Exhibit "A"** as its basis for determining temporary support. The attached corrected computer printout reflects the correct additional taxable income for the Petitioner and the full allowance for the contribution expenses claimed by the Petitioner in 2002. It also reflects the correct amount of property taxes and interest deductions claimed by the Respondent. The Court has also allowed a medical deduction solely for the amount allowed to be claimed in Respondent's tax return. In setting temporary support the Court has allowed a

hardship medical deduction for only a portion of the extraordinary medical expenses being claimed by the Respondent. The tax returns filed and the testimony of the Respondent established that of the un-reimbursed medical expenses being claimed the approximate amount of $9,500.00 was for non-traditional, alternative medicine therapy and/or treatment. Respondent testified that these monies expended were for alternative therapy/healing in the form of meditation to allow her to have or learn to enter into an altered state of mind and have "out of body experiences" to deal with the pain that she endures. Respondent acknowledged that this type of treatment/therapy has not been covered nor recognized by her medical insurance carrier as covered medical costs.

The Respondent's monthly income for the most part is found to be non-taxable income of approximately $5,180, in the form of disability payments. The Respondent maintains that a portion of said benefits are in the form of retirement benefits of $1,300 per month. The tax returns filed reflect that only $1,300, for the entire year of said benefits were taxable, and have been included as taxable income. The Court finds that there has been insufficient evidence provided to establish that $1,300 per month of the non-taxable disability benefits received by the Respondent are in fact advanced payments of her retirement account.

In determining the income of the Petitioner the Court has taken into consideration income of the Petitioner and also the income that he derives from income producing assets including but not limited to his investments.

In light of the premarital agreement that exists between the Petitioner and his present spouse (Petitioner's Exhibit #10), the Court has included his spouse's investment income as part of his new spouse's income for the purpose of determining issues overall for support.

The Court further modifies the prior temporary spousal support order, which provided for additional support in the form of educational expenses for the parties adult minor children. The Court finds that said education expenses previously ordered were in the form of additional spousal support. The Petitioner's order to show cause seeking to modify spousal support would implicitly include the adult educational expenses added on as additional spousal support that was ordered at the time of the temporary spousal support order issued in November of 1996. The Court grants the Petitioner's request to modify said provision and finds that no additional spousal support in the form of educational expense for the adult children is to be ordered. The two younger children have graduated from college. The oldest child, Tierney, who is now 28 years of age, is attending community college. Respondent has previously sought reimbursement for college expenses during times that Tierney was living with her boyfriend or living in the residence of the Respondent. The Court has previously determined that these were not the type of college expenses that the Court appeared to have intended as additional spousal support. In addition, the Court has previously determined that the Petitioner has fully met said obligation by virtue of the monies in the "educational trust" fund and the additional contributions to the adult children's education that he paid under the prior Court order.

III.

PERMANENT SPOUSAL SUPPORT

As reflected on the petition for dissolution of marriage and the response of said Petitioner, the parties were married on October 22, 1972 and separated on June 30, 1994 resulting in a marriage of long duration of approximately 21 years and 8 months [*Family Code Section 4320(f)*]. At the time of the parties' separation, there were no minor children as the three children born of this union were all adults.

The Petitioner will be 58 years of age, having been born on December 9, 1945. The Petitioner was employed during most of the marriage as a physician and continues to be employed as a physician, At the time of trial the Petitioner was earning approximately $10,000.00 gross per month. The evidence presented at time of trial established that the Petitioner's gross earnings at or near the time of separation were approximately $150,000.00 per year. The evidence presented established that Petitioner's education was obtained for the most part prior to the marriage, and that the community did not incur educational expenses for the Petitioner to become a licensed physician. The Petitioner testified and presented evidence that he has some health related issues as he suffers from chronic asthma and fixed airway obstruction. Petitioner testified he is on medication for said illness and was hospitalized on one occasion within the recent past. Though there is no cure for his illness, and it is a progressive disease, it has not precluded the Petitioner from remaining employed as a physician. Petitioner further testified that he intends to continue working to age 65 [*Family Code Section 4320 (a)(b)(c) & (h)*].

The Petitioner has remarried and resides with his spouse in Fargo, South Dakota. Petitioner's spouse is also employed as a physician at the same clinic as the Petitioner in Fargo, South Dakota.

The Respondent is 58 years of age having been born on October 12, 1945. Respondent was employed during the marriage as an attorney, however due to severe illnesses that she has developed the Respondent is presently disabled and unable to engage in any employment. As evidenced by the summary of medical history (marked and received into evidence as Exhibit N) of the Respondent, she suffers from various ailments including but not limited to chronic inflammatory demylinating polyneuropathy, type II diabetes, autoimmune pernicious anemia, a mitral valve prolapse, occasional phlebitis, and herniation/degeneration of several discs. Respondent is also on several medications and/or treatments in her efforts to combat her illnesses. Since approximately 1995 the Respondent was qualified to receive and has been receiving social security disability benefits [*Family Code Section 4320(h)*]. At the time of trial it was established that she receives social security disability benefits of $1,417.00 per month. In addition the Respondent also receives $5,050.00 per month in disability retirement benefits through her former employment with the County of Ventura as Assistant County Counsel. In 2002 approximately $1,300.00 of the total amount of retirement benefits received in that year were deemed taxable and the remaining amount was not subject to being reported, as it is non taxable income. Based on the nature and severity of the ailments afflicting the Respondent it does not appear that the Respondent will be able to return to the work force and unfortunately it appears that the disability of the Respondent is permanent.

(Respondent's medical reports received into evidence – Exhibits A & B).

As with the Petitioner there was no evidence that the community incurred educational expenses for the Respondent to become an attorney, as she obtained the majority of her education prior to the marriage. The Respondent did testify that she did devote herself for a period of time to domestic duties to care for the parties' minor children, but it did not affect her ability to return to work. Prior to Respondent's onset of her disability, the Respondent was employed as assistant county counsel and was earning approximately $80,000 per year. (Respondent's Exhibit D), [*Family Code Section 4320*]

At or near the time of the party's separation, the parties enjoyed a high middle-income lifestyle. The parties had a very comfortable life style in which they were able to purchase a home in an upper-income neighborhood, make contributions to a 401k and/or retirement plans through their respective employment, make contributions to charity and also save approximately $75,000.00 for their children's college education. The parties did not make extravagant purchases such as vehicles or jewelry, as the vehicles purchased during the marriage were at times used vehicles and would be kept for up to 10 years. The parties did take annual vacations, such as ski trips both in state and out of state. Some of these trips were in connection with the Petitioner attending seminars for his continuing medical education. In addition, they took out of state trips to visit relatives and also took vacations out of the country to Europe and to Israel. The parties appeared to have lived within their means, as of the date of separation the parties had relatively little or no debt, except for the mortgage on their residence.

Since the parties separation the income of the Petitioner has remained relatively stable. At the time of trial the Petitioner testified that his pay structure had recently changed, in that he was switched from that of an emergency room physician to that of a pediatrician. Petitioner testified that his present pay is set on a guaranteed salary of $10,000 per month, for approximately 3 months, then will change to a percentage of the billings submitted based upon the amount of patients he sees. In 2002 the Petitioner's total gross earnings as an emergency room physician was $139,780 with taxable gross earnings of $127,780, after taking into account the $12,000 he contributed to his 401k plan. If the Petitioner had been on the percentage basis in August of 2003, it was estimated that his income would have been approximately $11,000 in that month. In addition to the Petitioner's earnings the Petitioner also receives income in the form of interest, dividends and rental income as shown in his 2002 tax return. The Petitioner resides in the residence of his present spouse. The income and expense declaration dated June 26, 2003, submitted by the Petitioner lists average monthly expenses of approx $7,300.00. These expenses included one-half of the monthly mortgage, property taxes and insurance or the residence owned by his present spouse where Petitioner presently resides. As of the time of trial the Petitioner testified that the mortgage on said residence has now been paid-off. As such his living expenses have been reduced by approximately $1,070.00. Said expenses also included anticipated costs for educational expenses for his stepdaughter of approximately $1,100.00, which he is not presently incurring. The Petitioner's lifestyle does not appear to have change [sic] significantly since the date of separation. He continues to enjoy a similar lifestyle by taking vacations such as ski

trips, belongs to a tennis club, is able to make contributions to charity and continues to be able to make contributions to retirement plans in the form of a 401k plan. Petitioner has also been able to maintain his one-half interest in the rental property, and also maintain his investments that were awarded to him in the judgment resolving the division of property assets acquired during the marriage. The Petitioner has been prudent in his investments and as indicated in the schedule of assets he estimates the total value of his assets to be approximately $1,700,000.00. As such it does appear that the Petitioner would have the financial ability to contribute to the support of the Respondent if she is in need of financial support.

Respondent's present income consists of her social security disability benefits and her disability retirement benefits from the County of Ventura. Her total income from these two sources is approximately $6500.00 per month with the majority of said income being non-taxable. Since the time of separation the Respondent has not been able to be employed. During the marriage the Respondent testified that she was able to enjoy a very comfortable lifestyle. The Respondent testified that she did not make extravagant purchases for herself such as for clothing or jewelry, and was modest in her own personal expenditures. She testified that she was much more extravagant in her purchases when it came to making purchases for the parties 3 children. She testified that she handled the bulk of these expenditures during the marriage on behalf of the parties. Since the time of separation the Respondent has continued to reside in the former family residence. Respondent has been unable to make any further contributions to any retirement plans due to her disability and lack

of employment. The Respondent has continued to make contributions to charities as she did during the marriage. The family residence, where the Respondent continues to reside, was awarded to her as part of the property settlement reached between the parties. The Respondent testified that she estimates the present market value of said residence to be approximately $450,000.00. During the marriage the Respondent acknowledged that the parties purchased basic vehicles and/or used vehicles. The Respondent recently purchased a new vehicle in which she has a monthly payment of $652 with a balance due of $27,000. The Respondent's physical activities are limited by virtue of her illness. Her income and expense declaration dated June 23, 2003 lists monthly living expenses of $15,600. The expenses listed on said income and expense declaration also includes expenses she incurs and pays on behalf of her adult children. It also indicates one of the adult children lives in her home. Respondent's monthly mortgage residence expenses are listed at approximately $1,800 which include a 1st mortgage of $656.00 and a 2nd mortgage of approximately $1,200.00 with a balance owing on said 2nd mortgage of approximately $247,000.00. Respondent testified that the 2nd mortgage was for a loan taken which she utilized to purchase property in Malibu, Ca. Said Malibu property has since been sold and after payment of the encumbrances on said Malibu property and the costs of sale the Respondent received approx. $475,000.00. She further testified that she intends to use said monies to pay off credit card debt of approximately $50,000.00, payoff the 2nd mortgage on her residence and anticipates a tax liability on the sale of said residence of approx. $18,000.00. After payment of all said obligations the Respondent would be left with approximately $175,000.00. This would also reduce the monthly living

expenses of the respondent by approximately $2,300.00 per month. The Respondent's income and expense declaration also includes $1,774.00 in unreimbursed medical and dental expenses. However it appears that a significant portion of these expenses claimed are for non-traditional health treatments such as meditation and visualization programs, which involve out of state travel to receive this care. This is where the Respondent learned to enter into an altered state of mind to have "out of body experiences" in an effort to deal with the pain and discomforts from her illnesses. The out of pocket medical expenses claimed by Respondent in 2002 were approximately $23,554 (Respondent's 2002 federal tax return). Approximately $10,000 of those claimed medical expenses ere [sic] for the alternative treatment including travel costs to attend the classes.

The total monthly expenses listed by the Respondent on her income and expense declaration also includes expenses that she continues to incur for the adult children of the parties. Respondent testified that she continues to pay for auto insurance, health insurance and clothing for the adult children. Respondent also lists $1,600.00 per month as educational expenses being incurred for two of the adult children. Respondent lists monthly installment payments of almost $3,700.00 per month of which $652.00 is for her car payment, and the balance for credit card debt she has accumulated along with $2,000.00 for past due federal taxes. A review of the other monthly expenses listed by the Respondent, such as $500.00 per month for homeowner's insurance, almost $600.00 per month in monthly maintenance costs, $650.00 in utilities and $300.00 in telephone charges appear to be higher than the norm.

Since the parties separation the Respondent testified that she has been able to take a trip to Israel and also has traveled out of state to obtain non-traditional health care. She continues to make contributions to charity and provide financial assistance to the parties adult children. Since the date of separation and the division of the community assets, the Respondent testified that she has had to liquidate some of the assets that she received. Respondent also testified that she has liquidated some of her own separate property to be able to maintain her monthly expenses. The Respondent received by way of inheritance real property in Mammoth, California. Said property was eventually sold in 2000, after the parties' separation. Respondent testified that she received net, after payment of encumbrances and costs of sale, approximately $200,000.00. She further testified that these monies after payment of taxes, were invested into a limited partnership and/or the stock market. The limited partnership was not as profitable as hoped and was eventually sold. In addition, due to fluctuation in the stock market, the remaining value of said monies have been reduced to approximately $53,000.00. The Respondent also testified that due to her monthly expenditures that she has had to liquidate some of the assets she received and that her financial worth has diminished significantly. The Respondent provided an accounting of her expenditures from 1994 thru June 2003 (Respondent's exhibit M). During said nine-year period she maintains expenditures have been in excess of $1,180,000.00. At the time of the party's separation and the division of community assets the Respondent estimated the total value of the community estate to be worth approximately $3,200,000.00 of which her one-half share amounted to $1,600,000.00. At the time of trial the Respondent testified that the value of her estate has been

reduced to that of her residence, IRA accounts of approx. $100,000.00, an investment account with Fidelity of $53,000.00, an investment account with Morgan Stanley of $34,000.00 and the remaining $450,000.00 from the sale of the Malibu property, of which she will only have approximately $175,000.00 after payment of 2nd mortgage and other debts.

A review of the expenditures in Exhibit M, during said period indicates that a substantial portion of these expenditures over this period of time have been in the form of support for the adult children of the parties, including expenses with [sic] the adult children were in college or attending community college. These expenditures that she has incurred have been done by her choice to support her adult children. The Respondent testified that she made those expenditures in part, based on her understanding of the Court's prior ruling on educational expenses, and also out of a sense of moral obligation owed to the children. The Respondent certainly has the right to expend her funds as she deems fit, but by continuing to make expenditures at the rate the Respondent has chosen, it is abundantly clear that this will continue to reduce her assets.

The Petitioner's obligation of support for the parties' children legally ended upon their emancipation. The Petitioner by prior order of the Court and by the establishment of the college education fund has also made contributions to the cost of her adult children's education. However just as the Respondent is entitled to make her own judgments as to the extent of the support to be provided the Petitioner is also entitled to make his own judgments. The Petitioner's obligation to be considered by this Court is solely to that of the Respondent. Case law is clear that the Court cannot mandate a parent to continue

to provide child support for adult children under the guise of spousal support. *(In re Marriage of Serna* 85 CA4th 482).

In reviewing the standard of living of the parties at or near the time of separation, it appears that the Respondent would be able to maintain a lifestyle similar to that which she enjoyed at the time of the parties separation. If the Respondent did not continue to incur the expenses she has in the past for the adult children, it would appear that her monthly expenses would be dramatically reduced, and with her present income she would still be able to provide for all of her needs, including out of pocket medical expenses money for travel, charity and also continued savings. Excluding the expenses claimed by the Respondent for the adult children's education, the share of the expenses she continues to pay for them, the credit card debt and tax liability in which she has liquid assets to satisfy, a review of the Respondent's income and expense declaration indicates that the actual monthly expenses would appear to be less than one-half of the $15,000.00 per month listed on her income and expense declaration. This would also allow for approximately $700.00 per month for un-reimbursed medical/dental costs, $800.00 per month for travel and $1,250.00 per month of miscellaneous expenses.

The Respondent's present monthly income, from her social security and disability payments. amount to approximately $6770.00 per month which is virtually all non-taxable. This does not take into consideration any interest/dividend income that she can earn from her present assets, excluding her residence. Again, unfortunately it does appear that the Respondent's health is gradually deteriorating and she may not in the future be able to

provide for all of her anticipated medical needs and care. However, the Respondent has acquired long term care insurance at a cost of approximately $100.00 per month, which will hopefully be available to cover some of said anticipated costs.

The parties' lifestyle was an upper middle-income lifestyle, and with the income available to the Respondent, it does appear that she will for the present continue to be able to sustain a similar lifestyle based on her present income.

As such the Court finds that the Respondent at the present is able to be self-supporting and Petitioner's spousal support obligation is to be reduced to zero, as of October 1, 2003. As this is a long-term marriage, and due to the deteriorating health of the Respondent, the Court reserves jurisdiction over the issue of spousal support for the Respondent.

As the Petitioner has remarried the Court's jurisdiction to award spousal support to the Petitioner has been terminated by operation of law.

IV.

OVERPAYMENT OF SPOUSAL SUPPORT

The Petitioner is seeking credit and/or reimbursement for payments he made for the support of the Respondent during the period of August 1994 through June 1995. During this period of time, the Petitioner paid to the Respondent the sum of $3,000.00 per month. The payments made by the Petitioner were based in part on an agreement that had been reached by the parties and counsel and incorporated into the legal separation action

that was previously filed in 1991. The parties and counsel subsequently stipulated to set aside the Judgment for Legal Separation and the Marital Settlement Agreement. The Petitioner maintains that he continued to pay the $3,000.00 per month pursuant to an informal agreement that had been reached, pending efforts to reach a settlement. The Petitioner maintains that he overpaid support during this period as the income of the Respondent had increased and that his support obligation was actually lower and should have been as was ordered in November 1996, setting temporary support at the rate of $1,379.00 per month. Petitioner maintains that as part of this informal agreement, he believed he would be entitled to seek reimbursement if he was over paying support to Respondent.

Petitioner's claim for reimbursement or credit is denied. The Court deems the payments made during this period as voluntary payments of support. There apparently was an informal agreement reached by the parties through their respective counsel, for these payments to continue. The Respondent relied on these payments for her support during this time. If Petitioner believed the amount was more than he would have been obligated to pay, or believed that the Respondent was delaying settlement, he could have proceeded with an Order to Show Cause or Notice of Motion to determine the appropriate temporary level of spousal support. There was insufficient evidence submitted to establish that part of this informal agreement included an agreement that Petitioner would be entitled to such a reimbursement.

V.

ATTORNEY'S FEES AND COSTS

1. Art Appraisal Costs of $705.00:

The Respondent is seeking to be reimbursed the sum of $705.00 for the cost of an appraisal of certain personal property acquired during the marriage by the parties. Respondent had retained her own expert to determine the value of said artwork, but the appraisal value was questioned by the Petitioner. Petitioner sought to obtain his own appraisal. Respondent advanced the cost for the appraiser that the Petitioner had selected. This was done without the prior consent or knowledge of the Petitioner. Respondent testified that she advanced the cost to expedite the appraisal being sought by the Petitioner. There was no indication that the advancement of this appraisal cost by the Respondent, influenced the appraiser in determining the value of the artwork. The Court grants the Respondent's request and finds that the Petitioner owes to the Respondent the sum of $705.00.

2. Attorney's fees:

Each party is seeking a contribution from the other toward the attorney's fees and costs that they have incurred in this action. Both parties have incurred a considerable amount of attorney's fees in these proceedings. The Petitioner's declaration filed on April 12, 2004, indicates that he has incurred attorney's fees in excess of $182,000.00. Respondent in her declaration filed April 12, 2004, indicates that she has or will have incurred attorney's fees and costs in excess of $120,000.00.

This action began on January 6, 1995 when the Petitioner filed the Petition for Dissolution of Marriage. The Petition sought to terminate the status of the marriage and to confirm the prior settlement agreement that had been reached between the parties in a Judgment for Legal Separation (Judgment of Legal Separation filed and entered on December 30, 1994 in the Ventura County Superior Court Case No. D 228263).

Unfortunately for these parties, their initial apparent good-faith efforts to reach an amicable resolution of the division of assets, debts and support obligations, without having to endure protracted litigation and incur the corresponding financial burden of attorney's fees and costs, did not come to pass.

On June 9, 1995 the Respondent filed a motion for relief from Judgment entered in the Legal Separation action. Respondent sought to set aside the Judgment of Legal Separation and the underlying Marital Settlement Agreement that had been reached. The parties and their respective counsel signed a stipulation to set aside the Marital Settlement Agreement and the decree of legal separation. The Stipulation was signed by the parties in early to mid-August 1995, however, the Stipulation was not submitted to the Court for signature until 2½ years later in March 1998. During the interim, almost 9-year period, since the filing of the Petition for Dissolution of Marriage the parties and counsel appeared to have made efforts to resolve this matter by settlement but were unsuccessful. Each of the parties' declarations accuse the other of having presented obstacles and of frustrating the process and efforts to reach a settlement. The assertions of the parties range from being non-cooperative to intentionally misrepresenting the value of assets, and

intentionally attempting to deceive and/or defraud one of the parties.

In May 1999, while the underlying Petition for Dissolution of Marriage was pending, the Respondent filed an action in State Court and Federal Court against the Petitioner, his new spouse and his counsel at that time Mr. Leonard Smith, who is now deceased. The complaints alleged violations of the Racketeer Influenced and Corrupt Organizations Act of 18 U.S.C. Section 1961, commonly referred to as "RICO". These actions were filed by the Respondent, Pro Se. The Respondent alleged in said complaints that the Petitioner, his new spouse and his counsel had directly or indirectly through a pattern of racketeering activity conspired to wrongfully divert, hide, distort and misrepresent the Petitioner's assets through fraud on the Respondent, the Court and through obstruction of justice in order to wrongfully minimize the total marital estate. (Complaint filed May 24, 1999, United States District Court, Central District Case No. 99-05403, pages 1 & 2.) The primary asset in question was the Petitioner's interest in the Buenaventura Medical Center, where the Petitioner had worked as a physician.

The State action was dismissed by the Respondent in August 1999. The Federal RICO action was ordered stayed by the Federal Court, after a motion was filed on behalf of the Petitioner seeking to dismiss the RICO action.

In December 2000, the parties reached a written partial settlement agreement that was entered in July 2001. Said Judgment on Reserved Issues and partial agreement provided in part that the Respondent agreed to dismiss the RICO action and that Petitioner retained the

right to seek reimbursement for the attorney's fees Petitioner incurred in defending the RICO actions.

The Judgment on reserved issues and partial settlement agreement reached by the parties also resolved all of the issue between the parties including the division of assets and debts, except for the issues of permanent spousal support, retroactivity of spousal support, reimbursements for college expenses incurred for the adult children of the parties, and the issue of attorney's fees and costs being sought by both parties.

By agreement of counsel for the parties' trial on the issue of retroactivity of support was submitted to the Court based on the declarations and memorandum of points and authorities filed on behalf of the respective parties and the oral argument of counsel. It was the Petitioner who was seeking a modification of spousal support retroactive to July 1995, based in part on the stipulation of the parties to set aside the legal separation judgment. Petitioner maintained that he had agreed to pay more spousal support than he would have been obligated to pay, in exchange for a termination date as to said obligation. Petitioner also maintained that he continued to pay the amount of spousal support indicated in the legal separation action, even after the parties agreed to set it aside, with the understanding that he would be entitled to seek reimbursement for any overpayments. The Respondent opposed said request for modification maintaining that it would amount to an impermissible retroactive modification. The Respondent prevailed on said issue as the Court as the Court found that to grant a modification of said order would be a retroactive modification although it does appear that the Petitioner was correct that the

spousal support was paid under the temporary support order was higher than it should have been ordered.

The issue of the college expenses and reimbursement proceeded to trial. Respondent was seeking reimbursement for college expenses she incurred for the parties' adult children. Petitioner opposed the reimbursement maintaining the expenses incurred by the Respondent were beyond those ordered by the Court. Petitioner also maintained that the monies in the educational fund that had been set up by the parties and under the control of the Respondent, plus other monies he had paid either met or exceeded his obligation to pay for the college expenses of the adult children. The Petitioner prevailed on said issues, wherein the Court found that the Petitioner had met his obligation and did not owe any further monies to the Respondent for the college expenses of the adult children of the parties.

The issue of spousal support also proceeded to trial. Along with the issue of spousal support at time of trial, the Court also heard the Order to Show Cause that had been filed in January 2002 on behalf of the Petitioner seeking a modification of the temporary spousal support order. The Court granted the Petitioner's request for modification that resulted in a reduction in spousal support payable by the Petitioner to the Respondent. The Court's decision as to long-term spousal support has resulted in a further reduction to a reservation of spousal to the Respondent.

It is tragic and unfortunate that the parties have had to incur and expend the amount of attorney's fees in these proceedings. What began in 1994 as an effort of both parties to reach a full resolution of their respective issues, by minimizing conflict and costs, has turned into an

ongoing legal battle over the past 9 years. Even the parties' and counsel's efforts to have this matter expeditiously resolved by the Court has had stumbling blocks outside of their control, by virtue of the change in judicial officers handling this matter and the recusal of judicial officers in either hearing or continuing to hear this matter. When the parties attempted to have their disputes resolved out of the Court system, by hiring a private retired commissioner, it was not successful and further contributed to the delay in having this case resolved.

Both parties have had very experienced and capable counsel throughout most, if not all of these proceedings. The evidence submitted clearly establish that counsel for the parties made concerted efforts throughout these proceeding to reduce the time and expense of the parties by attempting to resolve matters and/or identify the specific issues that the Court would need to resolve. Yet despite these efforts of counsel, this proceeding has had a very lengthy and expensive history.

The Petitioner is seeking a contribution of attorney's fees from the Respondent and in particular, is seeking reimbursement for the attorney's fees he incurred in defending the RICO complaint filed by the Respondent. Petitioner seeks fees under *Family Code Sections 2030(a), 270 and 271,* maintaining that the RICO proceedings are a related matter to this action. Petitioner further maintains that the Respondent filed said RICO action in bad-faith, as said action was without merit, unnecessary and brought in attempt to gain leverage over the Petitioner in this action. Respondent maintains that the RICO action was an independent action separate and apart from this dissolution proceeding. Respondent further maintains that it was not brought in bad-faith, nor in an attempt to harass the

Petitioner, but rather brought in good-faith and to protect her rights and the remedies available to her in said action which would not be available in this dissolution proceedings.

The Court finds pursuant to *Family Code Section 2030(a)* and pursuant to *In Re Marriage of Green* 6 Cal.4th 584, that the RICO action was a related action to this dissolution of marriage proceeding. The RICO action was not a proceeding brought or instituted by a third party, but rather an action filed directly by the Respondent. Respondent's letter dated June 24, 1999, (Exhibit Q of Declaration of Theodore W. Kleiman, filed April 12, 2004), clearly establishes that the RICO action would be used to affect the dissolution proceeding. In said letter of June 24, 1999, the Respondent acknowledges that the filing of the RICO action would likely lead to Petitioner having to obtain new counsel, that if action were not taken on the Dissolution of Marriage proceeding within the time limits set by Respondent, that she would vigorously pursue the RICO action. The Respondent who is an attorney filed the RICO on her own behalf. The timing of the filing of the RICO action appears clearly designed to produce or affect the result of the dissolution action. The basis of the set aside of the Legal Separation Judgment and the RICO action appears to be centered on the allegations of the Respondent that the Petitioner was intentionally and knowingly misrepresenting the value of his interest in the Buenaventura Medical Center, and was attempting to deceive and defraud the Respondent front receiving her full community property interest in all of the community assets including the Buenaventura Medical Center. However, long before the filing of the RICO action by the Respondent the Petitioner had stipulated to set aside the Legal Separation

Judgment and the Marital Settlement Agreement that had been incorporated therein. Though the Respondent maintains that it was not her subjective intent to use the RICO action as leverage or to affect this dissolution proceeding, the objective facts lead to a different conclusion. "We do not mean to suggest that depending on other proceedings ordinarily unrelated to a family law actions may not become 'related' by virtue of the motives of the party initiating the proceedings in question." *In Re Marriage of Seaman & Menjou* 1 Cal.4th 1489, at 1499.

The Petitioner maintains that the RICO action is evidence of the bad-faith actions of the Respondent and is evidence of Respondent's conduct that frustrates the policy of the law to promote settlement and reduce the cost of litigation. The Petitioner testified that he incurred approx. $30,000.00 in attorney's fees defending said action, while the Respondent did not incur any fees as she was representing herself. Petitioner maintains that he prevailed in the RICO action by obtaining a stay of the proceeding before it was eventually dismissed. The Respondent maintains that her RICO action was found to be of merit, as the Court did not grant the request for dismissal sought by the Petitioner, (Page 3 Exhibit #14 of Respondent's Request to take Judicial Notice filed April 27, 2004) and that Respondent has agreed to a stay. A review of the pleadings in the RICO action, indicate that the Federal Court found that the factual allegation raised in the RICO complaint filed by the Respondent were legally sufficient to state a cause of action, but made no ruling as to the merits of said allegations. (Page 8 Exhibit #14 of Respondent's Request to take Judicial Notice). The pleadings further reflect that the Respondent opposed the dismissal and requested that the Court neither abstain nor stay the

RICO proceedings. (Page 25 of Exhibit #11 of Respondent's Request to take Judicial Notice). As the RICO action was dismissed as part of the settlement reached between the parties, there was never a judicial determination as to the actual merits of Respondent's claims and allegations. At trial on the issue of attorney's fees the Respondent testified as to the reasons that she filed the RICO claim. However, there was no substantiating evidence presented to support her claim that the Petitioner, his new spouse and/or his former counsel had conspired to defraud or deceive the Respondent. The testimony of the Petitioner was that at the time that the parties entered into the original settlement agreement that was incorporated into the judgment of legal separation, that it was his belief that the value of his interest in the Buenaventura Medical Center was minimal. The Petitioner had been involved in the attempts to sell the clinic, however it appears that the Respondent had been made fully aware that said efforts were not successful. It appears evident to the Court that neither Petitioner or Respondent believed or expected that there would be a sale of the clinic at the time they entered into their original marital settlement agreement they reached in the Legal Separation action. It is also evident that the eventual sale of said clinic and the amount eventually determined to be the value of the Petitioner's interest in said clinic is what lead to the Respondent's suspicion and belief that the Petitioner had failed to fully disclose the true value of said interest and was attempting to deceive the Respondent. However the evidence presented solely is indicative of a suspicion and not of any substantiated basis for the beliefs, conclusion and assertions made by the Respondent in the RICO action. The Petitioner upon being notified of the Respondent's desire to set aside the agreement reached in the Legal

Separation action, agreed and stipulated to set aside the agreement and to start anew. There was no evidence presented that the Petitioner failed to comply with discovery requests of the Respondent. The Court notes that the Court file does not reflect any motions filed seeking to compel compliance with any discovery demand.

The objective evidence presented to the Court leads the Court to the conclusion that the RICO action was brought by the Respondent in bad faith and was brought in an effort to gain a leverage and affect the outcome of this dissolution of marriage proceedings. Said filing is also found to be in violations of the policy of the law as expressed in *Family Code Section 271.* The Respondent's letters of June 24, 1999, not only links her demands for certain actions to be taken or accepted to avoid the RICO action being pursued, but also raised a veil threat of potential criminal exposure under RICO.

The Court therefore finds that attorneys would be appropriate, if the Respondent has the ability or is reasonably likely to have the ability to pay attorney's fees. Based on the present financial position of the Respondent it does not appear that she has the ability nor is reasonably likely to have the ability to pay attorneys fees to the Petitioner. Though the Respondent received as her part of the division of the community assets and her separate assets property with a value of approximately $1,600,000, the Respondent's estate has dwindle [sic] dramatically. As previously found by the Court the reduction in her estate appears to be not only due to investments that did not prove to be as profitable as anticipated, but also due to the monetary expenditures the Respondent has made for the support of the adult children of the parties. The Respondent has also incurred a significant amount of attorney's

fees and owes a significant balance on the attorney's fees she has incurred. It is unclear to the Court, in light of the amount of expenditures that the Respondent has made in the past, why she was not able to make payments to reduce the outstanding balance owed to her counsel. Based on Respondent's present income and assets she would have monthly income available to her to make monthly payments to pay the fees that she has incurred with her own counsel but, does not appear to have income or assets available to contribute to the fees incurred by the Petitioner.

The Respondent is also seeking a contribution of attorney's from the Petitioner. The Respondent maintains that the Petitioner's conduct in these proceedings have been in violation of policies set out it *Family Code Section 271.* The Court finds that the Respondent has failed to establish by preponderance of the evidence that the actions of the Petitioner have been to frustrate settlement or to increase the amount of litigation and costs in this matter. Though the Petitioner did not prevail on the issue of retroactivity, it does not appear that said motion was in bad faith or without any merit. The history of this case and the course of the proceedings in this matter have been somewhat unusual and out the ordinary course of proceedings. The amount of time devoted to the issue of retroactivity was relatively minimal in comparison to the amount of time that has been expended over the past 9 years.

The Respondent is also seeking a contribution of attorney's fees pursuant to *Family Code Sections 2030 and 2031.* The Respondent maintains that there is a substantial disparity in the present income of the parties and also as to the current value of their respective estates. The Petitioner's financial picture is certainly stronger than

that of the Respondent. The Petitioner appears to have been much more prudent in his investments, managing of his assets that he received from the division of the community estate and/or limiting his expenditures. The Petitioner also has incurred a significant amount of attorney's fees and he has been able to meet said fees incurred on an ongoing basis. Based on the present income of the parties a total contribution of fees in the sum of $25,000.00, payable by the Petitioner to the Respondent would appear to be appropriate, as the Petitioner does have the present financial ability to make a contribution of fees to the Respondent. The Petitioner was previously ordered to make a contribution of fees of $10,000. At the time said order was made in November of 1996, it was without prejudice to being reallocated on a portion of the Respondent's share of the community property. [Transcript of November 22, 1996, Page 17, Lines 19-23]. The $10,000 previously paid by Petitioner pursuant to said order, are now deemed a continuation of attorney's fees by Petitioner to Respondent. However in light of the conduct of the Respondent and the additional fees that the Respondent's conduct caused the Petitioner to incur it would be inequitable to reward the Respondent for said conduct by ordering Petitioner to contribute any additional fees, except for those previously ordered by the Court, and the $705 for reimbursement on the art appraisal.

Dated: MAR 11 2005 /s/ Manuel J. Covarrubias
MANUEL J. COVARRUBIAS
JUDGE OF THE SUPERIOR COURT

DissoMaster Data Screen
Monthly Figures

Input Data	Husband	Wife
Party Info	Husband	Wife
Number of children	0	0
% time with NCP	0.00	0.00
Filing Status	<-MFJ	HH/MLA
# federal exemptions	3	2
Wages + salary	11648	0
Self-employment income	0	0
Other taxable income	722	1299
TANF plus CS received	0	0
Other nontaxable income	0	5180
New-spouse income	11264	0
Adj. Income (ATI)	1263	0
SS paid other marriage	0	0
CS paid other relationship	0	0
Health insurance	263	249
Itemized deductions	1073	5788
Other medical expenses	0	695
Property tax expenses	515	575
Ded. interest expense	206	3340
Contribution deduction	352	1178
Miscellaneous Itemized	0	0
Required union dues	0	0
Mandatory retirement	0	0
Hardship deduction	0*	625*
Other guideline deductions	0	0
AMT Info (IRS Form 6251)	0	0
Child support add-ons	0	0

Guideline (2002)	
Nets (adjusted)	
Father	7945
Mother	5605
Total	13550
Support	
Presumed CS	
Basic CS	
Add-ons	
S. Clara SS	379
Total	379
CS Range:	
Proposed, Tactic 9	
Presumed CS	0
Spousal Support	379
Total	379
Comb. Savings	0
Releases (opt)	0
Default Case Settings	
1 Tax Settings Changed	

Cash Flow Analysis	Gdln.	Prop.
Comb. net spendable	13550	13550
Percent change	0%	0.0%
Husband, payor of SS, Prop. SS.		
Payment Cost	292	292
Net spendable income	7566	7566
Change from guideline	0	0
% of combined spendable	55.8%	55.8%
% of saving over guideline	0%	0.0%
Total Taxes	4162	4162
Dep. exemptions value	0	0
# withholding allowances	0(es)	0(es)
Net wage paycheck	7714	7714
Wife		
Payment benefit	379	379
Net spendable income	5984	5984
Change from guideline	0	0
% of combined spendable	44.2%	44.2%
% of saving over guideline	0%	0.0%
Total Taxes	0	0
Dep. exemptions value	0	0
# withholding allowances	0	0
Net wage paycheck	0	0

DissoMaster Detailed Input Data
Monthly Figures

Husband/Wife Data

Input Data	Husband	Wife
Party Info	Husband	Wife
Blind	No	No
65 or older	No	No
New spouse is blind	No	No
New spouse is 65 or older	No	No
Lived w/ MFS spouse part of yr.	Yes	Yes
Number of children	0	0
% time with NCP	0.00	0.00
Filing Status	<-MFJ	HH/MLA
# federal exemptions	3	2
Self	1	1
New spouse	1	0
Other dependents	1	1
Auto-calculate total	No	No
Wages + salary	11648	0
Self-employment income	0	0
Other taxable income	722	1299
Short-term capital gains	0	0
Long-term capital gains	0	0
Line 4e from IRS form 4952	0	0
Unrecaptured Sec 1250 gain	0	0
Ordinary Dividends	105	0
Qualified Dividends	105	0
Interest received	308	0
Social Security received	0	1458
Unemployment compensation	0	0
Operating losses	(0)	(250)
Royalties	0	0
Rental income	252	0
Other	57	93
TANF plus CS received	0	0
Other nontaxable income	0	5180
Significant other, MFS income	0	0

Tax exempt interest	0	0
Depreciation or other	0	5180
New-spouse income (& expenses)	11264	0
Wages + salary	11264	0
Self-employment income	0	0
SS paid other marriage	0	0
Retirement contribution if ATI	0	0
Required union dues	0	0
Necessary job-related expenses	0	0
Adjustments to Income (ATI)	1263	0
SS paid other marriage	0	0
CS paid other relationship	0	0
Health insurance	263	249
Paid by party	263	249
Wage deduction	0	0
Itemized deductions	1073	5788
Other medical expenses	0	695
Property tax expenses	515	575
Deductible interest expense	206	3340
Contribution deduction	352	1178
Miscellaneous itemized	0	0
Required union dues	0	0
Mandatory retirement	0	0
Qualified adjustment to income	0	0
Nonqualifying contributions	0	0
Hardship deduction	0*	625*
Other Fam C 4071(b) kids	0.0	0.0
$$$ for Fam C 4071(b) kids	0	0
Calculated	0	0
Extraordinary health expenses	0	625
Uninsured catastrophic losses	0	0
Use calculated hardship	Yes	Yes
Other guideline deductions	0	0
Necessary job-related expenses	0	0
Other discretionary deductions	0	0
AMT Info (IRS Form 6251)	0	0
4 Certain Interest on home mortgage	0	0
7 Investment Interest	0	0

8 Post-1986 depreciation	0	0
9 Adjusted gain or loss	0	0
10 Incentive stock options	0	0
11 Passive activities	0	0
12 Estates and trusts. Sched K-1 (Form 1041, line 8)	0	0
13 Tax exempt interest from private activity bonds (post 8/7/1986)	0	0
14 Other preferences (see IRS Form 6251)	0	0
20 AMT operating loss deduction	(0)	(0)
Child support add-ons	0	0
Child care: kids this relationship	0	0
Visits, school & travel expenses	0	0
Uninsured health expenses	0	0
Child care for other kids	0	0

[LOGO] **SUPERIOR COURT OF CALIFORNIA**
♦ COUNTY OF VENTURA

DECLARATION OF MAILING

Case Number: D-229385 Case Name: KLEIMAN

I am employed in the County of Ventura, State of California and declare under penalty of perjury that I am not a party to the within action or proceeding and that on MARCH 14, 2005 I deposited a AMENDED STATEMENT OF DECISION in sealed envelopes in the United States Post Office at the Ventura County Government Center according to proper procedure, or placed the document in the Interoffice mail of the County of Ventura using the standard practice.

MARK A. NELSON
ATTORNEY AT LAW
300 ESPLANADE DRIVE
SUITE 1170
OXNARD CA 93030

MICHAEL J. SILVER
ATTORNEY AT LAW
1860 BRIDGEGATE STREET
WESTLAKE VILLAGE, CA 91361

MELODIE M. KLEIMAN
ATTORNEY AT LAW
355 LA SALLE
VENTURA, CA 93003

Dated and executed at Ventura, California on MARCH 14, 2005

Michael D. Planet, Superior Court
Executive Officer and Clerk

By: /s/ Rosa I. Briers
ROSA I. BRIERS
Judicial Secretary

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

DIVISION 6

January 22, 2007

Melodie Kleiman
355 La Salle Ave.
Ventura, CA 93003-1909

KLEIMAN, THEODORE
Petitioner-Respondent

v.

KLEIMAN, MELODIE
Appellant

Marriage of:

B185586
Ventura County No. D229385

THE COURT:

Petition for rehearing is denied.

cc: All Counsel
File

Court of Appeal, Second Appellate District,
Div. 6 – No. B185586
S149886

IN THE SUPREME COURT OF CALIFORNIA,

En Banc

THEODORE KLEIMAN, Respondent,

v.

MELODIE KLEIMAN, Appellant.

(FILED MAR 14, 2007)

The petition for review is DENIED.

GEORGE
Chief Justice

California Family Code § 271

§ 271. Basis and effect of award

(a) Notwithstanding any other provision of this code, the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction. In making an award pursuant to this section, the court shall take into consideration all evidence concerning the parties' incomes, assets, and liabilities. The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden on the party against whom the sanction is imposed. In order to obtain an award under this section, the party requesting an award of attorney's fees and costs is not required to demonstrate any financial need for the award.

(b) An award of attorney's fees and costs as a sanction pursuant to this section shall be imposed only after notice to the party against whom the sanction is proposed to be imposed and opportunity for that party to be heard.

(c) An award of attorney's fees and costs as a sanction pursuant to this section is payable only from the property or income of the party against whom the sanction is imposed, except that the award may be against the sanctioned party's share of the community property.

California Family Code §§ 2030 and 2032

§ 2030. Ordering party to pay to ensure other party's access to legal representation

(a)

(1) In a proceeding for dissolution of marriage, nullity of marriage, or legal separation of the parties, and in any proceeding subsequent to entry of a related judgment, the court shall ensure that each party has access to legal representation to preserve each party's rights by ordering, if necessary based on the income and needs assessments, one party, except a governmental entity, to pay to the other party, or to the other party's attorney, whatever amount is reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding during the pendency of the proceeding.

(2) Whether one party shall be ordered to pay attorney's fees and costs for another party, and what amount shall be paid, shall be determined based upon, (A) the respective incomes and needs of the parties, and (B) any factors affecting the parties' respective abilities to pay. A party who lacks the financial ability to hire an attorney may request, as an in pro per litigant, that the court order the other party, if that other party has the financial ability, to pay a reasonable amount to allow the unrepresented party to retain an attorney in a timely manner before proceedings in the matter go forward.

(b) Attorney's fees and costs within this section may be awarded for legal services rendered or costs incurred before or after the commencement of the proceeding.

(c) The court shall augment or modify the original award for attorney's fees and costs as may be reasonably

necessary for the prosecution or defense of the proceeding, or any proceeding related thereto, including after any appeal has been concluded.

(d) Any order requiring a party who is not the spouse of another party to the proceeding to pay attorney's fees or costs shall be limited to an amount reasonably necessary to maintain or defend the action on the issues relating to that party.

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§ 2032. Award to be just and reasonable; Implementation of case management

(a) The court may make an award of attorney's fees and costs under Section 2030 or 2031 where the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties.

(b) In determining what is just and reasonable under the relative circumstances, the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in Section 4320. The fact that the party requesting an award of attorney's fees and costs has resources from which the party could pay the party's own attorney's fees and costs is not itself a bar to an order that the other party pay part or all of the fees and costs requested. Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their relative circumstances.

(c) The court may order payment of an award of attorney's fees and costs from any type of property, whether community or separate, principal or income.

(d) Either party may, at any time before the hearing of the cause on the merits, on noticed motion, request the court to make a finding that the case involves complex or substantial issues of fact or law related to property rights, visitation, custody, or support. Upon that finding, the court may in its discretion direct the implementation of a case management plan for the purpose of allocating attorney's fees, court costs, expert fees, and consultant fees equitably between the parties. The case management plan shall focus on specific, designated issues. The plan may provide for the allocation of separate or community assets, security against these assets, and for payments from income or anticipated income of either party for the purpose described in this subdivision and for the benefit of one or both parties. Payments shall be authorized only on agreement of the parties or, in the absence thereof, by court order. The court may order that a referee be appointed pursuant to *Section 639 of the Code of Civil Procedure* to oversee the case management plan.

California Family Code § 4320

In ordering spousal support under this part, the court shall consider all of the following circumstances:

(a) The extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage, taking into account all of the following:

(1) The marketable skills of the supported party; the job market for those skills; the time and expenses required for the supported party to acquire the appropriate education or training to develop those skills; and the possible need for retraining or education to acquire other, more marketable skills or employment.

(2) The extent to which the supported party's present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties.

(b) The extent to which the supported party contributed to the attainment of an education, training, a career position, or a license by the supporting party.

(c) The ability of the supporting party to pay spousal support, taking into account the supporting party's earning capacity, earned and unearned income, assets, and standard of living.

(d) The needs of each party based on the standard of living established during the marriage.

(e) The obligations and assets, including the separate property, of each party.

(f) The duration of the marriage.

(g) The ability of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party.

(h) The age and health of the parties.

(i) Documented evidence of any history of domestic violence, as defined in Section 6211, between the parties, including, but not limited to, consideration of emotional distress resulting from domestic violence perpetrated against the supported party by the supporting party, and consideration of any history of violence against the supporting party by the supported party.

(j) The immediate and specific tax consequences to each party.

(k) The balance of the hardships to each party.

(l) The goal that the supported party shall be self-supporting within a reasonable period of time. Except in the case of a marriage of long duration as described in Section 4336, a "reasonable period of time" for purposes of this section generally shall be one-half the length of the marriage. However, nothing in this section is intended to limit the court's discretion to order support for a greater or lesser length of time, based on any of the other factors listed in this section, Section 4336, and the circumstances of the parties.

(m) The criminal conviction of an abusive spouse shall be considered in making a reduction or elimination of a spousal support award in accordance with Section 4325.

(n) Any other factors the court determines are just and equitable.

IN THE COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THEODORE KLEIMAN, Petitioner and Respondent, v. MELODIE KLEIMAN, Appellant.	2nd Civil No. B 185586 Ventura County Superior Court Case No. D 229385

APPEAL FROM THE
VENTURA COUNTY SUPERIOR COURT
HON. MANUEL J. COVARRUBIAS,
JUDGE PRESIDING

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR REHEARING

(FILED JAN 19, 2006)

MELODIE KLEIMAN
355 La Salle Ave
Ventura, CA 93003
Telephone: 805 642 9151
Fax: 805 642 6930

In Pro Per

TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SIX:

Petitioner MELODIE KLEIMAN hereby applies for an order extending the time to file a petition for rehearing to and including January 19, 2007. The 30 day period in which the Court could extend Appellant's ability to file a Petition for Rehearing ends on Saturday, January 20, 2007. Appellant could not file a petition prior to this time because she was very ill, having undergone major two surgeries, each requiring hospitalization, suffering the effects of general anesthesia and requiring bed rest. Appellant has not previously sought or obtained an extension of time in this case. Respondent has sought and been granted multiple extensions of time in this case, over Appellant's objections and despite prejudice to her.

Appellant requests this extension for the reasons set forth in the attached declaration of Melodie M. Kleiman.

Appellant's request is based on this application, the attached declaration of Melodie M. Kleiman and the records and files herein.

Dated: January 18, 2007.

/s/ Melodie Kleiman
MELODIE KLEIMAN

Applicant seeks to file the petition for rehearing as a procedural requirement to file an appeal with the California Supreme Court. Applicant knows of no prejudice which Respondent will suffer if this extension is granted.

Applicant submits that good cause exists to extend the time for filing her Request for Rehearing to and including January 19, 2007.

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct. This declaration was executed at Ventura, California.

Dated: January 18, 2007.

/s/ Melodie Kleiman
MELODIE KLEIMAN

PROPOSED ORDER

Based on the application of Appellant and good cause appearing:

IT IS HEREBY ORDERED that the time in which to file Appellant's Petition for Rehearing shall be, and hereby is, extended to and including January 22, 2007.

Dated: JAN 19 2007 /s/ ACTING YEGAN
PRESIDING JUSTICE

History of the "Reasonable Judge" Definition

Magnus v. Edwards (1980) 40 F. Supp. 2d 908, 914-915:

Federal review of a state court's application of mixed law and fact is determined by § 2254(d)'s "unreasonable application of" clause. *Nevers,* 1999 WL 97993, at *9. The Sixth Circuit has recently articulated a standard that "combines the not entirely consistent standards enunciated by the First and Fifth Circuits." *Nevers*, 1999 WL 97993, at *29 (Bright, J., concurring).

The Fifth Circuit's approach to questions of mixed law and fact dictates that "an application of law to facts is *unreasonable* only when it can be said that reasonable jurists considering the question would be of one view that the state court decision is incorrect. In other words, we grant habeas relief only if a state court decision is so clearly incorrect that it would not be debatable among jurists." *Drinkard v. Johnson,* 97 F.3d 751, 769 (5th Cir. 1996), *cert. denied*, 520 U.S. 1107, 137 L. Ed. 2d 315, 117 S. Ct. 1114 (1997). The Fourth and Eleventh Circuits have adopted the "reasonable jurist" test for mixed questions of law and fact. *See Green v. French,* 143 F.3d 865, 870, 873 (4th Cir. 1998), *cert. denied*, 142 L. Ed. 2d 698, 119 S. Ct. 844 (1999); *Neelley v. Nagle,* 138 F.3d 917, 924 (11th Cir. 1998), *cert. denied*, 142 L. Ed. 2d 671, 119 S. Ct. 811 (1999).

The First Circuit explicitly rejected the *Drinkard* court's "reasonable jurist" test. *See O'Brien v. DuBois,* 145 F.3d 16, 25 n.7 (1st Cir. 1998). The First Circuit gave two reasons: "First, the test is circular inasmuch as it defines 'unreasonable application' by reference to what 'reasonable jurists' think about an issue. Second, and more importantly, we regard the test as too deferential because it focuses on the reasonableness of individual judges, more

so than on the reasonableness of judicial decisions. Given that reasonable judges occasionally make unreasonable decisions, the *Drinkard* court's interpretation of the 'unreasonable application' clause could drain it of much of its practical meaning." *Id.* (citation omitted). The *O'Brien* court stated that the following standard must be met before a federal court should issue a writ: "The state court decision must be so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes." *Id.* at 25.

The Seventh Circuit has promulgated several different standards. *See Lindh v. Murphy,* 96 F.3d 856, 871 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320, 138 L. Ed. 2d 481, 117 S. Ct. 2059 (1997) (a federal court must "take into account the care with which the state court considered the subject."); *Hall v. Washington,* 106 F.3d 742, 748-49 (7th Cir. 1997), *cert. denied*, 139 L. Ed. 2d 190, 118 S. Ct. 264 (1997) ("The statutory 'unreasonableness' standard allows the state court's conclusion to stand if it is one of several equally plausible outcomes."); *Hennon v. Cooper,* 109 F.3d 330, 335 (7th Cir. 1997), *cert. denied*, 522 U.S. 819, 139 L. Ed. 2d 32, 118 S. Ct. 72 (1997) (specifically rejecting the *Lindh* court's "care with which the state court considered the subject" test and stating that the appropriate question is "whether the determination is at least minimally consistent with the facts and circumstances of the case.").

The Sixth Circuit had, previous to the decision in *Nevers*, adopted the Fifth Circuit's "reasonable jurist" test. The Sixth Circuit stated that a "district court could find the state court determinations unreasonable 'only when it can be said that reasonable jurists considering the question

would be of one view that the state court ruling was incorrect. In other words, we can grant habeas relief only if a state court decision is so clearly incorrect that it would not be debatable among jurists.'" *Herbert v. Billy*, 160 F.3d 1131, 1135 (6th Cir. 1998), *reh'g en banc denied*, Jan. 21, 1999 (quoting *Drinkard,* 97 F.3d at 769).

However, recently, the Sixth Circuit "stated as well our agreement with the standard enunciated by the First Circuit. . . . " *Nevers,* 1999 WL 97993, at *10. The *Nevers* court recognized that the First Circuit had specifically rejected the "reasonable jurist" test, but decided that "the two are not mutually exclusive; rather, both standards can be employed to aid in arriving at the correct answer to the question of 'unreasonableness.'" *Id.* Thus, the Sixth Circuit's new hybrid rule states that"[HN4] the unreasonableness of a state court's application of clearly established Supreme Court precedent will not be 'debatable among jurists,' *Drinkard,* 97 F.3d at 769, if it is 'so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes,' *O'Brien,* 145 F.3d at 25." *Id.*

The concurrence in *Nevers* disagreed with the amalgamation of the two standards, arguing that the two standards are "not entirely consistent," that the new standard "creates too rigid a bar for relief," and cautioning the majority that the new standard "approaches a suspension of the Writ of Habeas Corpus," which would be in contravention of Article I, Section 9, of the United States Constitution. *Nevers,* 1999 WL 97993, at *29.

However, the opinion merely defines the "reasonable judge" for purposes of reviewing a state court's determination of mixed questions of law and fact. This interpretation

is preferred considering that one "panel of [the Sixth Circuit] cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or [the Sixth Circuit] sitting en banc overrules the prior decision." *United States v. Smith,* 73 F.3d 1414, 1418 (6th Cir. 1996) (quotation omitted). The *Herbert* court, while adopting the Fifth Circuit approach, did not specifically reject the First Circuit test. Thus, in the Sixth Circuit, it appears that the Fifth Circuit's "reasonable jurist" test has been fleshed-out by the First Circuit's "so offensive, arbitrary, devoid of record, and thus outside the universe of plausible and credible outcomes" test.

In addition to this new standard for reviewing a state court's determination of law and facts,[HN5] the Sixth Circuit has determined that the phrase "as determined by the Supreme Court of the United States" means that a "district court or court of appeals no longer can look to lower federal court decisions in deciding whether the state decision is contrary to, or an unreasonable application of, clearly established federal law." *Herbert*, 160 F.3d at 1135 (citation omitted). *Compare Neelley*, 138 F.3d at 922-23 (determining that the first step under § 2254 is to determine the "clearly established" law at the relevant time, as guided by *Teague v. Lane,* 489 U.S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989) – which held that new rules should not be applied retroactively in reviewing habeas applications), *with Green,* 143 F.3d at 873 *and Drinkard,* 97 F.3d at 767 (declining to view the term "clearly established federal law" as a codification of the *Teague* doctrine). *But see O'Brien,* 145 F.3d at 25 ("To the extent the inferior federal courts have decided factually similar cases, reference to

those decisions is appropriate in assessing the reasonableness *vel non* of the state court's treatment of the contested issue.").